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In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. *Weinberger v. Wiesenfelder*, 420 U.S. 636 (1975), teaches that when the government's true reason for treating citizens unequally is known, courts should not accept post hoc justifications that were not the goal of the challenged legislation. In light of *Weinberger*, may the state of Maine justify the unequal treatment of religion in a high school education program on grounds that plainly were not an actual goal of legislators who enacted the program?

2. Until 1980, Maine had a long history of including religious options in its high school "tuitioning" program and there is nothing in the state constitution that even arguably requires the exclusion of religious options from that program. Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious options entirely from an otherwise neutral educational aid program based solely on a misinterpretation of the Federal Establishment Clause?

LIST OF PARTIES

The parties to the proceeding below were petitioners Kevin and Julia Anderson, Dale and Bethany Daniels, Lionel and Jill Guay III, Stephen and Sharon Jerome, Christine Koza, Lawrence and Kathryn Rugan, Michael and Jennifer VanDerWerf, Michael and Jerilyn Ward; and respondents Durham School Department, Superintendent Shannon Welsh, Minot School Department, Superintendent Robert Wall, Raymond School Department, Superintendent Sandra Caldwell, Maine Department of Education, Commissioner Susan Gendron; and intervenor-respondents Maine Civil Liberties Union, David Currier, Timothy Fitzgerald, Lois Kilby-Chesley, Tim and Joan Morin, Howard Reben, W W Reily, Ken and Barbara Williams.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court Sitting As The Law Court, entered in the above-entitled proceeding on April 26, 2006.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court Sitting As The Law Court has been reported at 895 A.2d 944 and is reprinted in the appendix hereto, p.1, *infra.*

The opinion of the Cumberland County Superior Court has been reported at 2004 Me. Super. LEXIS 206 and is reprinted in App. 41, *infra.*

JURISDICTION

The judgment of the Maine Supreme Judicial Court Sitting As The Law Court was entered on April 26, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The texts of 20-A M.R.S.A. §§ 2951 and 5204(4) are reproduced in App. 64-65, *infra.*

STATEMENT OF THE CASE

A. Statement of Facts

During the height of the anti-Catholic Know Nothing hysteria in 1854, the Maine Supreme Court upheld the Ellsworth School Committee's expulsion of fifteen year-old Roman Catholic Amanda Donahoe for refusing to read from the Protestant King James Bible.[1] Amanda regarded it as sinful to do so, on the advice of her priest, Father John Bapst. Noting that "[l]arge masses of foreign population are among us, weak in the midst of our strength," the Court held that her religious scruples could not justify her refusal.[2]

Father Bapst began teaching Amanda and several other expelled Catholic children in a chapel in Ellsworth that was used on Sundays for religious services, until a mob of Ellsworth Know Nothings burned down the chapel, tarred and feathered Father Bapst, rode him out of town

[1] *Donahoe v. Richards*, 38 Me. 379 (1854).

[2] *Donahoe*, 38 Me. at 413. Maine continued to require Bible reading in its public schools until this Court held in 1963 that the practice violated the Establishment Clause in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). See also Ernst Helmreich, *Religion and the Maine Schools: An Historical Approach* (1960).

on a rail, and threatened to burn him at the stake.[3] For his safety, the Catholic authorities moved him north to Bangor, Maine. John Bapst Catholic High School in Bangor, one of Maine's four Catholic high schools in 1980, was named in memory of Father Bapst and his steadfastness in the face of Protestant persecution.

In 1980, John Bapst Catholic High School was forced to close, after Maine's Attorney General advised its principal that a legal opinion that he was about to issue concluded that religious schools could no longer receive tuition payments from towns that did not maintain their own public high school. These towns tuitioned their students to whatever public or private high school the students' families selected.[4] Despite religious high schools having participated in this tuitioning system from its inception in 1879, when all or virtually all of the private schools in Maine were religious (albeit overwhelmingly Protestant),[5] the Attorney General concluded that such participation violated the Federal Establishment Clause and that the existing statute had to be construed to exclude the choice of religious schools.[6] Although by 1980

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[3] Nor was the Ellsworth attack an isolated incident: the Old South Church in Bath, Maine, which was rented for Catholic religious services, was burned to the ground by another Know Nothing mob the same year. William David Barry, *Fires of Bigotry*, Down East Magazine (Oct. 1989).

[4] Plaintiffs' Statement of Material Facts ¶¶ 2, 3, Tab 6 in Appendix to Petitioner's Brief below (hereinafter "App. Below").

[5] Maine districts have paid tuition for their resident students to attend private elementary schools for over 200 years, Ava Harriet Chadbourne, *History of Education in Maine* 31-39 (1936), a practice extended to secondary schooling in 1879, at which time most of the private academies were religious, *id.* at 281-84; William Stetson, *A Study of the History of Education in Maine* 86 (1902).

[6] Op. Me. Att'y Gen. 80-2 (1980), App. 68.

only a very small number of students attended religious schools on such tuition payments, a substantial proportion of the students at John Bapst Catholic High School did so.[7]

The Attorney General's Opinion (hereinafter "AG Opinion") was legally flawed. It failed to treat separately two very different types of tuition payments made by districts that did not maintain their own high schools. Such districts could either contract with a private school for schooling privileges for all its resident high school students or allow families to choose the private or public school of their choice. Under the first or "contract" option, students are compelled to attend the private school, and the Attorney General quite properly found it would violate the Establishment Clause to force students to attend a religious school. But he failed to analyze separately the statutory provision allowing parents to choose their children's school and receive what amounts to a scholarship from their district, which presents a markedly different constitutional context. The Attorney General lumped together the two distinct programs in his analysis.[8]

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[7] In 1979-80, 124 of John Bapst's 308 students were attending on tuition from their towns, out of a total of 211 students tuitioned statewide to sectarian schools. The 211 students constituted a mere 1.1-1.2% of students tuitioned at that time. Joint Stipulation of Facts ¶¶ 15, 16, Tab 5 in App. Below.

[8] Among the cases the AG relied on for his analysis was *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), but he failed to notice that in that decision this Court *expressly reserved judgment* on the question of "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 782 n.38. This Court specifically distinguished *Nyquist* in *Zelman v. Simmons-Harris* on the basis of that note. 536 U.S. 639, 661-62 (2002).

The Maine Department of Education implemented the AG Opinion for the 1980-81 school year.[9] The Attorney General had prepared his Opinion for Senator Howard Trotsky, chairman of the Maine Legislature's Joint Education Committee, which was preparing a complete revision of Maine's education laws. This revision, passed in 1982 and made effective in 1983, incorporated the Opinion's conclusion by modifying the tuitioning statute to specifically exclude any school that was not a "nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2).[10]

Besides forcing John Bapst Catholic High School to close, the implementation of the Opinion by the Education Department and its incorporation into the Maine statutes denied tuition payments to students attending several other religious schools that formerly received them. These included Cheverus High School and St. Dominic's High School, Catholic schools, and Pine Tree Academy, a Seventh Day Adventist school. In 1997, families in the tuitioning town of Raymond, Maine with high school students attending Cheverus High School filed a lawsuit in state court challenging the constitutionality of their school district's denial of tuition payments.

The plaintiffs argued that the 1980 AG Opinion misinterpreted the Establishment Clause and that incorporating its erroneous conclusion into the tuitioning law failed both strict scrutiny and rational basis review under the Equal Protection Clause. The Maine Supreme Court in

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[9] Affidavit of James Watkins, Jr. ¶ 29, Joint Exhibit 5 to the Joint Stipulation of Facts, Tab 5 of App. Below.

[10] A copy is attached at App. 64.

Bagley v. Raymond Sch. Dep't, 728 A.2d 127, *cert. denied*, 528 U.S. 947 (1999), while acknowledging that an erroneous interpretation of the Establishment Clause could not supply a rational basis for religious discrimination, rejected the idea that the Attorney General had misinterpreted the Establishment Clause. The Court held that even though the tuition payments were directed by the free and independent choices of the parents they nonetheless had a primary effect of advancing religion under *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and that compliance with the Establishment Clause was a compelling basis for discriminating against parents selecting religious schools.

Three years after denying certiorari in *Bagley*, this Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* laid to rest the idea that it violates the Establishment Clause to allow parents a free and independent choice of schools under a religiously-neutral school choice program, even where a large majority of families choose religious schools. After the Maine Attorney General issued a cursory letter to the Maine Commissioner of Education directing him to continue applying § 2951(2)'s exclusion of religious schools after *Zelman*,[11] parents in three tuitioning towns (Raymond, Durham, and Minot) with children attending St. Dominic's High School and Pine Tree Academy filed suit in state court seeking to have § 2951(2) overturned on the basis of *Zelman*.

[11] This letter is attached at App. 66.

B. Proceedings Below

After holding that the districts' actions denying tuition payments on behalf of petitioners' children pursuant to § 2951(2) was not action taken under color of state law under 42 U.S.C. § 1983 and dismissing the districts from the suit,[12] the trial court held that the state defendants had not violated the Free Exercise, Establishment, or Equal Protection Clauses of the Federal Constitution.[13] Recognizing that the trial court had to follow the Maine Supreme Court's erroneous resolution of the similar Free Exercise and Establishment claims in *Bagley*,[14] petitioners focused primarily on their Equal Protection claim that § 2951(2) did not satisfy rational basis review, let alone the compelling interest test normally applied to non-neutral religious classifications. The trial court rejected that claim, finding it irrelevant that § 2951 was based on a misunderstanding of the Establishment Clause because the state had asserted new rationales, including that § 2951 promoted the compelling state interest of religious diversity in public schools. These new rationales were put forward by individual state legislators opposed to legislation designed to repeal § 2951(2) that was introduced after

[12] The *Anderson* court declined to rule on the appeal of this issue deeming it a moot point. 895 A.2d at 950 n.5.

[13] Petitioners dropped a claim under the Free Speech Clause after this Court rejected a Free Speech claim in *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004).

[14] Petitioners preserved these claims and subsequently argued them to the Maine Supreme Court, seeking to have it overrule its prior resolution of them in *Bagley*. The Court declined to do so on the merits and consideration of the Free Exercise and Establishment claims would be properly before this Court on certiorari.

this lawsuit was filed in 2002.[15] The legislation failed, but the trial court used the diversity rationale given by some of the legislators rather than evaluating the actual reason § 2951(2) was adopted in 1982 – namely, to comply with the state's mistaken understanding of the Federal Establishment Clause.[16]

On appeal, the Maine Supreme Court affirmed by a 6-1 vote. The Court began its analysis by rejecting petitioners' argument that the 1980 AG Opinion was poorly reasoned, concluding that the Attorney General "gave good advice" and that the Maine Legislature "acted prudently and responsibly in taking that advice and enacting section 2951(2)." The court also stated that the Attorney General and Legislature were motivated by a desire to respect and comply with the Establishment Clause, rather than any religious animus.[17]

Relying upon this Court's rejection in *Locke* of the idea that a statute is presumptively unconstitutional when it is not neutral with respect to religion, *Anderson* rejected petitioners' Free Exercise and Establishment Clause

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[15] *Anderson* mistakenly states this lawsuit arose after the legislation was defeated. 895 A.2d at 949.

[16] Petitioners objected to the consideration of these rationales as incapable of justifying a statute passed more than 20 years before for another reason. Petitioners also noted that the state failed to mention a number of other rationales given by legislators in 2003 that were less "noble" than diversity, such as the cost savings the state derived from the religious discrimination, a continued belief that the Establishment Clause required the discrimination, and a fear that religious neutrality might allow unpalatable religions to open schools. Transcript of House Debate on LD 182 (May 13, 2003), in App. Below at 169-178 (comments of Reps. Cummings, Mills, Davis and Gagne-Friel).

[17] *Anderson*, 895 A.2d at 958.

claims. It held that § 2951(2) does not substantially burden a religious practice,[18] merely prohibiting the state from funding parents' school choice without "burden[ing] or inhibiting religion in a constitutionally significant manner." 895 A.2d at 959. *Anderson* concluded that "*Locke* recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause." *Id.* at 954.

Anderson then applied the rational basis test to reject petitioners' Equal Protection claim, relying on *Locke* and the First Circuit's decision in *Eulitt v. Maine Department of Education*, 386 F.3d 344 (2004).[19] It characterized that

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[18] Although the Maine Court recognized that several of the petitioners had religious motivations for sending their children to religious schools, it found that since their religions did not *mandate* that they do so, their religious practices were not substantially burdened. Most of the petitioners are Catholics, and while Catholic doctrine states that Catholics should send their children to Catholic schools like St. Dominic's, it recognizes this is sometimes impossible and does not make it an inflexible requirement. See *Gravissimum Educationis* in *Documents of Vatican II* 637 (Walter M. Abbot, S.J. ed. 1965) ("Catholic parents are reminded of their duty to send their children to Catholic schools wherever this is possible"). The substantial burden requirement is inconsistent with this Court's decisions in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div. v. Smith*, 494 U.S. 872 (1990), as well as *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170-71 (3rd Cir. 2002); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-67 (3rd Cir. 1999); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995); and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3rd Cir. 1994). Both the D.C. and Third Circuits have rejected any requirement that a religious practice must be mandatory before it can be protected. *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002), and *Tenafly*, 309 F.3d at 171.

[19] *Eulitt* was a parallel lawsuit filed in federal court challenging the constitutionality of § 2951(2).

test as "requir[ing] only that a fairly conceivable set of facts establish a legitimate government interest that would support the challenged classification" and noted that the state had offered several conceivable justifications: avoiding excessive entanglement between religion and state, concerns about maintaining religious diversity in the public schools, and avoiding involvement in discrimination in admissions and hiring by religious schools.[20] The Court rejected petitioners' argument that *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), barred the state from offering additional rationales for the statute when the actual rationale is known. The Court found the state's newly proffered reasons to be "not inconsistent with or contradictory to prior stated goals," and in particular found a concern with excessive entanglement to be both an original justification for the AG Opinion and a conceivable justification even after *Zelman*'s vindication of school vouchers.[21]

REASONS FOR GRANTING THE WRIT

I. STATE AND FEDERAL COURTS ARE DIVIDED ON WHETHER THE RATIONAL BASIS TEST PERMITS CONSIDERATION OF CONCEIVABLE RATIONALES WHEN THE ACTUAL PURPOSE OF CHALLENGED LEGISLATION IS KNOWN.

Weinberger teaches that when the government's true reason for treating citizens unequally is known, courts should not accept *post hoc* justifications that were not the

[20] 895 A.2d at 960.

[21] *Id.*

goal of the challenged legislation. The Maine Supreme Court's treatment of the *Weinberger* decision clearly and directly conflicts with the interpretation of *Weinberger* by both the Third and Ninth Circuits. It opined that under *Weinberger* it was not "bound by the justification proffered by the State in support of the statute in *Bagley*, or offered in support of the legislation in 1981 [sic]." *Anderson*, 895 A.2d at 960. Earlier in the decision, the court rejected any implication that the Attorney General and the Legislature were motivated by religious animus, specifically finding that they "were motivated by a desire to respect and comply with the requirements of the Establishment Clause as then interpreted and applied by the United States Supreme Court." *Id.* at 958. Thus, the justification the *Anderson* court refuses to be bound by is the very justification it recognizes actually motivated the Attorney General in his Opinion and the Maine Legislature, namely, compliance with the Establishment Clause. In a very similar case involving a challenge to state action taken to comply with an erroneous understanding of the Establishment Clause, the Ninth Circuit held that *Weinberger* did *not* permit consideration of other possible justifications where the actual justification was known, *i.e.*, where the asserted purpose could not have been a goal of the policy. *Christian Science Reading Room v. City of San Francisco*, 784 F.2d 1010 (9th Cir.), *as amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1997). *Accord Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1097 (3rd Cir. 1981).

Moreover, to the extent *Anderson* tries to avoid its failure to follow this Court's decision in *Weinberger* by asserting that a desire to avoid excessive entanglement was an original justification for the statute, the Maine

Court is being disingenuous. Excessive entanglement is, of course, an aspect of this Court's test for compliance with the Establishment Clause and was discussed in the 1980 AG's Opinion, but its discussion of excessive entanglement is as patently flawed as the Opinion's discussion of whether sending tuition payments to religious schools had a primary effect of advancing religion. The Attorney General reached the erroneous – and frankly insupportable – conclusion that the Establishment Clause would require the state to engage in a program of constant surveillance to be "certain" that non-public school teachers were not allowing religious instruction to "seep" into the secular educational curriculum.[22] In reality, no such "surveillance" is, nor ever has been, required for true school choice programs like Maine's tuitioning option, as *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zelman* make clear. To the extent the Maine Supreme Court continues to be concerned about preventing religious education from taking place in religious schools chosen by tuitioned students, its decision conflicts with *Witters* and *Zelman* and the Third Circuit's decision in *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002).

Finally, this Court's decisions, such as *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), rejecting erroneous Establishment Clause interpretations as justifications for discriminating against religious activities, implicitly disallow such misunderstandings from serving as legitimate justifications for classifications that, like

[22] AG Opinion at App. 91.

Maine's, discriminate against religious perspectives and organizations on their face.

A. *ANDERSON*'S APPLICATION OF THE RATIONAL BASIS TEST DIRECTLY CONFLICTS WITH THIS COURT'S APPLICATION OF THAT TEST IN *WEINBERGER V. WIESENFELD* AND WITH DECISIONS OF THE THIRD AND NINTH CIRCUITS APPLYING *WEINBERGER*.

Although it acknowledged that § 2951(2) was enacted to incorporate the Attorney General's erroneous conclusion that the Establishment Clause forbade families in tuitioning towns from choosing sectarian schools, *Anderson* nonetheless concluded that it could consider other "conceivable rationales" that the legislature could have *but did not* consider at the time. This approach to rational basis review under the Equal Protection Clause conflicts with this Court's decision in *Weinberger* and the decisions of two federal circuit courts. In those three cases, where the *actual* reason for adoption of a statute is known, other reasons that might have been *but were not considered* cannot justify the challenged classification.

In *Weinberger*, this Court stated that a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." 420 U.S. 636, 648 n.16 (1975). *Anderson* interpreted the *Weinberger* "could not have been" language as permitting consideration of "conceivable" justifications the state offered 25 years after the discriminatory exclusion was effected, but which were clearly not considered by either

the Attorney General or the Education Department in implementing the exclusion of religious schools from Maine's tuitioning program in 1980,[23] or the legislature in 1982 in incorporating the exclusion into the revised education code.[24] According to *Anderson*, so long as the new justifications are "not inconsistent with or contradictory to prior stated goals" they can be considered.

This approach obviously misunderstands *Weinberger*, because in that case the government offered a justification of a classification challenged under the Equal Protection Clause that was neither inconsistent with nor contradictory to what the Court found to be the actual purpose underlying the statutory scheme. Rather, the Court found

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[23] Uncontested evidence shows that the Attorney General met with the principal of Bapst to tell him the effects of his opinion before it was issued in 1980 and that the Education Department implemented the exclusion required by the AG Opinion in the 1980-81 school year. Affidavit of Joseph Sekera, Joint Exhibit 4 to the Joint Stipulation of Facts, Tab 5 of the App. Below.

[24] The language of § 2951(2) plainly reflects the conclusion of the AG Opinion by requiring that a participating school be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." The legislative history of the enactment of the revised education code in which § 2951(2) appeared for the first time demonstrates conclusively that no substantive changes were intended by the enactment of the new code, which was held in abeyance for a year until 1983 to give the public time to find any substantive changes inadvertently included. *Bangor Baptist Church v. Maine Dep't of Educ. and Cultural Servs.*, 576 F. Supp. 1299, 1315 n.28 (D. Me. 1983). During the 2003 debate over possible repeal of § 2951(2), a member of the revision committee from 1982 confirmed that § 2951(2) "came about as a result of an Attorney General Opinion requested by Howard Petrosky [sic]," and "caused a change in 1981 . . . in the recodification of Title 20A," which was "done in strict concurrence with the Attorney General's recommendations" in his Opinion. App. Below at 176; Transcript of House Debate on LD 182 at H-589 (May 13, 2003) (comments of Rep. Millett).

it "apparent both from the statutory scheme and from the legislative history" that the justification offered by the government was not the actual purpose behind the statute. 420 U.S. at 642. Thus, where, as in this case, *the actual justification for a classification is known*, *Weinberger* stands for the proposition that conceivable justifications not actually considered at the time of enactment should not be accepted as potential justifications by a reviewing court. However appropriate it may be to accept conceivable hypothetical justifications when the actual reasons for a classification are unclear or unknown in order to give effect to the strong presumption of validity deriving from respect for the legislature's role in enacting legislation, *see FCC v. Beach Communications*, 508 U.S. 307, 314-15 (1993), ignoring the known actual reason behind an enactment in favor of conceivable justifications does not respect the legislature's proper role and constitutes judicial abdication of its responsibility to provide meaningful review.

In *Christian Science Reading Room, Inc. v. City of San Francisco*, the Ninth Circuit addressed a situation similar to *Anderson*. Defendants offered a mistaken interpretation of the Establishment Clause as a rational basis for a policy of excluding religious entities from renting space in a public airport. Relying on *Weinberger*, the court refused to consider two justifications the state defendants offered at trial because it found that the airport did not consider those purposes in adopting its new policy, and was instead motivated solely by a perceived need to correct an Establishment Clause violation. Since there was no Establishment Clause violation, remedying such a violation could not supply a rational basis for the religious classification. In its decision, the Ninth Circuit recognized that the two

asserted rationales it refused to consider might have been legitimate justifications, but nevertheless rejected them because the evidence made clear the actual reason for the challenged classification. *Christian Science Reading Room*, 784 F.2d at 1073.

The Ninth Circuit cited an earlier Third Circuit decision interpreting *Weinberger* as support for refusing to consider conceivable rationales when the actual rationale is known: *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087 (3rd Cir. 1981). In that case, the Third Circuit concluded that its ability to consider purposes for classifications advanced by counsel or by itself was limited by *Weinberger* to those situations where it was not attributing to the government "purposes which it cannot reasonably be understood to have entertained." 641 F.2d at 1097. In other words, conceivable justifications can be used to fill in for actual justifications only where the justifications actually entertained are not known. Where the actual justifications are known the government cannot reasonably be understood to have entertained others. Thus, in a situation like *Anderson* where we know the purpose of § 2951(2) was remedying a perceived violation of the Establishment Clause, the *Delaware River Basin Commission* and *Christian Science Reading Room* cases interpret *Weinberger* to preclude consideration of any other justifications, in direct conflict with *Anderson*.

B. *ANDERSON*'S INTERPRETATION OF EXCESSIVE ENTANGLEMENT CONFLICTS WITH *WITTERS*, *ZELMAN*, AND THE THIRD CIRCUIT'S *TENAFLY* DECISION

Perhaps recognizing the weakness of its application of *Weinberger*, the *Anderson* Court also asserts that

"excessive entanglement between religion and state, a component of Establishment Clause analysis, was an original justification for the statute and is asserted by the State" in *Anderson*. 895 A.2d at 960. The Court finds that "[i]t remains conceivable, even after *Zelman*, that under some set of facts funding tuition for sectarian schools would run afoul of the Establishment Clause on excessive entanglement grounds." *Id.* That conclusion represents a fundamental misunderstanding of this Court's application of the excessive entanglement component of the *Lemon* test for Establishment Clause violations.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court articulated a three-part test for Establishment Clause challenges, the third part of which required that a challenged program be capable of being administered without excessively entangling the state with religion. It then used the excessive entanglement prong to strike down a program of subsidies for private school teachers teaching secular subjects. The program required that the subsidized courses had to be secular to avoid advancing religion. This Court found that an excessive entanglement of the state with religion would result from the continuing surveillance necessary to ensure that teachers under religious control and discipline did not bring religion into the secular subjects the government was paying them to teach.

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court addressed a program in which publicly-employed teachers were sent into private religious schools to teach secular remedial courses and found that such aid would not excessively entangle the state with religion because the supervision necessary to ensure that religion did not seep into the remedial classes was not excessive. In so holding,

Agostini distinguished between direct aid cases that support religious schools as institutions and indirect aid cases that aid students and where any benefit to the schools they attend occurs incidentally to the receipt of aid by the students. In direct aid cases, supervision is necessary to ensure that the aid does not support the religious functions of the schools. In indirect aid cases such supervision is unnecessary, because any aid to the religious function of the school is incidental and permissible.

Accordingly, in *Zelman*, as in *Witters*,[25] decided 16 years earlier, this Court was not concerned with the issue of excessive entanglement because it had concluded that the *Zelman* program was an indirect aid program, *i.e.*, one that was religiously-neutral in structure and where whatever benefits flowed to religious schools did so as a result of the free and independent choices of the students' families. Such programs do not require the state to police the program to prevent aid to the religious function of the schools attended by the program's beneficiaries, and pervasively sectarian schools and universities may participate on an equal basis.

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[25] In *Witters* this Court unanimously upheld the provision of government aid to a student attending a pervasively religious college to pursue a religious vocation, noting that whatever benefit accrued to the school was incidental to his free and independent choice of the school. Because the aid to the school was indirect, no ongoing surveillance was necessary to ensure the effects of the aid were limited to secular functions or activities. If such surveillance were required in indirect aid cases, it would inevitably be excessive because virtually all aspects of a pervasively-sectarian school's activities are imbued with religion, because that is the definition of a pervasively sectarian institution. As *Anderson* found, all the schools the petitioners' children attend are pervasively sectarian. 895 A.2d at 950.

The excessive entanglement concerns discussed in the 1980 AG Opinion were premised on the improper view of the program as providing direct assistance. As previously noted, the Opinion mistakenly treated the relationship between the tuitioning districts and the schools receiving tuition payments on behalf of the students who choose them as one of direct aid to the schools. (This is, of course, part and parcel of the general failure of the Opinion to recognize the proper legal differences between paying tuition pursuant to a contract with a private school to educate all of a district's high school students and paying tuition in towns that allow parents to choose the schools their children attend.) The Opinion mistook the parent-directed tuition payments to the schools for direct aid. Consequently, the Opinion discusses excessive entanglement in the context of a direct aid program in which all aided activities must be secular and policed. The AG Opinion and its subsequent enshrinement in the education code were in no way premised on excessive entanglement concerns relevant to indirect aid programs.

In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), the Third Circuit, by contrast with the decision below, followed the correct approach toward the entanglement prong of the *Lemon* test. Addressing the local government's argument that continuing to let a religious group use its telephone poles to create an "eruv," a religious zone for Sabbath purposes, would constitute an actual violation of the Establishment Clause, the court stated that entanglement only "matters . . . in the context of direct aid to parochial schools, where the Court subsumes it within the 'effect' analysis, see *Agostini v. Felton*, and in the rare case where government delegates civic power to a religious group." *Tenafly*, 309 F.3d at 175

n.36 (citations omitted). See also *L. M. v. Evesham Twp. Bd. of Educ.*, 256 F. Supp.2d 290, 305 (D. N.J. 2003) ("Entanglement is not an issue in indirect aid cases like the one presented here").

C. THIS COURT'S PRECEDENTS DO NOT ACCEPT ERRONEOUS INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE AS EXCUSES FOR DISCRIMINATION AGAINST RELIGION

In her concurring opinion in *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994), Justice O'Connor stated that "[t]he Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." It should go without saying that an erroneous interpretation of the Establishment Clause is even less of a warrant for discriminating against religion, but *Anderson* disagrees. This Court has confronted many instances where governments have claimed the Establishment Clause requires that they exclude or otherwise discriminate against religious participants in some manner. Where this Court has concluded that in fact the Establishment Clause does not require discrimination, it has not hesitated to strike down those classifications. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Widmar v. Vincent*, 454 U.S. 263 (1981). Implicit in these cases is the understanding that a mistaken interpretation of the Constitution does not provide a legitimate basis for religious discrimination. In all of these cases, the results of this Court's decisions were that

religious entities would receive benefits amounting to subsidies for activities containing religious elements, but under religiously-neutral criteria. Only very recently has this Court allowed a state to discriminate against religion without the Establishment Clause requiring it, and then only in very limited circumstances. *Locke v. Davey*, 540 U.S. 712 (2004). *Anderson* misreads that decision to justify Maine's continuing discrimination against parents seeking to use the tuitioning program to send their children to religious schools.

II. ANDERSON'S MISINTERPRETATION OF *LOCKE V. DAVEY* UNDERCUTS THE FEDERAL RELIGION CLAUSES

In *Locke*, this Court addressed an indirect aid program for the first time since upholding the Cleveland Program in *Zelman*. Although finding that *Locke*'s Promise Scholarship Program comported with *Zelman*'s Establishment Clause standards, this Court nevertheless permitted the state to invoke a more restrictive religion clause of the Washington Constitution to deny Promise Scholarships to students pursuing degrees in "devotional theology" leading to religious vocations. This Court found that the program's exclusion fell into an area between the two Federal Religion Clauses, holding that not all actions permitted by the Establishment Clause are required by the Free Exercise Clause. Quoting from *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), which upheld against Establishment Clause challenge the widespread practice of tax exemptions for charitable bodies, including religious entities, this Court said "we have long said that 'there is room for play in the joints' between [the Clauses]." *Locke*,

540 U.S. at 718. Based on an historical analysis of the efforts of many states to avoid state funding of ministers and their training as manifested in their state constitutions, *Locke* concluded by stating that "[i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

This Court's "play in the joints" metaphor implies that the room between the two religion Clauses is quite narrow, and much of the *Locke* opinion is concerned with emphasizing how narrow its holding is. The opinion is replete with limiting language concerning the uniqueness of the ministerial training exclusion and the extent to which the program includes religious benefits despite the exclusion of devotional theology majors. *Anderson*, however, and the First Circuit in *Eulitt* (on which the *Anderson* court relies heavily), ignore the limitations emphasized in *Locke* and extend its holding to the point where the "play in the joints" exception is no longer narrow at all, but separates the two Religion Clauses so far that they can no longer perform their joint function of protecting religious liberty.

Far from being premised on a longstanding state constitutional tradition similar to avoiding the funding of ministers and their training, Maine's exclusion of students choosing religious schools is based on a 25-year-old misunderstanding of the Establishment Clause. Maine's Constitution not only lacks both the sort of religion clauses this Court relied on in *Locke*[26] and the Blaine Amendments properly disparaged by the plurality in *Mitchell v. Helms*,

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[26] The eight state constitutions cited in *Locke*, 540 U.S. at 723, all contain "compelled support clauses" stating that no one shall be compelled to support or attend any religious ministry without his or her consent.

530 U.S. 793, 829 (2000), as "born of bigotry" toward Catholics,[27] it contains an education article enacted in 1819 authorizing state grants for the founding of private – including religious – schools and permitting the tuitioning of students to such schools.[28] Thus, unlike *Locke* where the refusal to fund ministerial training reflected Washington's longstanding state constitutional tradition, in Maine the exclusion of families choosing religious schools contradicted a much older state constitutional tradition of supporting students attending private schools on a religion-neutral basis.

Unlike the "relatively minor burden on Promise Scholars" that Washington's ministerial training exclusion imposed, *Locke*, 540 U.S. at 725, Maine's § 2951(2) denies petitioners a state-funded high school education for their children at the school of their choice – simply because the school happens to be religious. Each family will spend well over $20,000 for each child's high school education, and each couple works three, and sometimes four, jobs in order to pay the tuition denied them by § 2951(2).

Finally, while this Court could say in *Locke*, "we believe that the entirety of the Promise Scholarship Program goes a long way to including religion in its benefits," § 2951(2) excludes religion entirely from its

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[27] Blaine Amendments, which are found in some 37 state constitutions, generally prohibit appropriations for the aid or support of sectarian schools. See, *e.g.*, Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551 (2003); and Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998).

[28] Article VIII, pt. 1, § 1, attached at App. 63.

benefits. It excludes all students choosing a religious high school from the tuitioning program. Whereas Promise Scholars in Washington can "attend pervasively religious schools, so long as they are accredited," *id.* at 724, petitioners' children cannot. Promise Scholars can even take devotional theology courses, so long as they do not major in devotional theology, *id.*, but petitioners' children cannot take any devotional religion classes.

These factors led this Court in *Locke* to reject Davey's presumption of unconstitutionality under the Free Exercise Clause. In *Anderson*, these same factors should have led not only to a presumption of unconstitutionality, but to a finding of a violation of both Religion Clauses.

A. UNLIKE IN *LOCKE*, NO HISTORICAL TRADITION SUPPORTS PREVENTING PARENTS FROM USING STATE AID TO ATTEND RELIGIOUS SCHOOLS

In their decisions in *Anderson* and *Eulitt*, the Maine Supreme Court and the First Circuit greatly expanded *Locke*'s scope from a refusal to fund students training for religious vocations to a refusal to fund students choosing to attend religious secondary schools. Even though *Locke* is replete with statements that it involves the narrow issue of training for the ministry, these courts have taken out of context the single instance where the decision uses arguably broader language: "The State has merely chosen not to fund a distinct category of instruction." *Locke*, 540 U.S. at 944. While in context it is clear this Court was referring to religious vocational training as the "distinct category of instruction," these lower courts have chosen to read the phrase as allowing Maine to exclude the very forms of religious education this Court specifically noted

the Washington Program allowed participants to obtain. If this over-reading of *Locke* is allowed to stand, every state could exclude families choosing religious schools from any school choice program. While school choice programs are still rare at the elementary and secondary education levels, virtually all states provide student assistance grants and subsidized loans at the postsecondary level. Modeled on the religiously-neutral federal higher education student assistance programs such as the GI Bill, Pell Grants, and Guaranteed Student Loans, these state programs have traditionally permitted students to select religious colleges and universities, but *Anderson* would support extending *Locke*'s exclusion to all such colleges.

Neither the United States in general nor Maine in particular have an historical tradition justifying the broad exclusion of religion from publicly-funded elementary and secondary education analogous to the historical tradition of not funding the salaries and religious training of ministers. On the contrary, the public or common schools were originally conceived and operated as generically (nondenominationally) Protestant institutions, which is why Roman Catholics such as Amanda Donahoe found them so inhospitable, leading to the creation of Catholic parochial schools.[29] This also explains why this Court had to devote such a large proportion of its modern Religion Clause jurisprudence to purging religion from the public schools in pursuing the principle of religious neutrality. But neutrality does not mean hostility. When this Court upheld releasing public school students on school time to

[29] Lloyd Jorgenson, *The State and the Non-Public School 1825-1925* 111-145 (1987).

go off-site to religious centers for religious instruction in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952), it said:

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Prior to 1980, Maine's tuitioning system epitomized a publicly-funded but religiously-neutral system. While traditional public schools continued into modern times to include generically Protestant religious exercises, Maine allowed families to choose what sort of school to which to send their children. The state's interest in a well-educated citizenry was met through requiring these schools to meet various curriculum and certification requirements, while parents' desires for an exclusively secular or religious education were also met. Indeed, the irony that Maine, the home state of James G. Blaine for whom the Blaine Amendments are named, does not have a Blaine Amendment in its constitution while 37 other states do, is explained by the fact that in 1924 the Maine legislature rejected a proposed Blaine Amendment because some 42 Protestant and two Catholic schools received state subsidies.[30]

Thus, whatever the significance of this Court's finding that there existed a longstanding historical tradition of

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[30] Helmreich, *supra* note 2, at 50.

prohibiting vocational training for the ministry to the Promise Scholarship Program in *Locke*, no such similar tradition justifies broadening the application of *Locke* to include school choice programs like Maine tuitioning. Limited to vocational training for the ministry, the discrimination against a "specific category of instruction" permitted by *Locke* creates a narrow exception to the general principle that government classifications should not discriminate for or against religion that is embodied in the federal Religion Clauses. *Anderson* and *Eulitt*'s expansive gloss on *Locke* to include all education with religious components plainly infringes on religiously-motivated activity in violation of the Free Exercise Clause and inhibits or hinders religion in violation of the Establishment Clause.

B. CONTRARY TO *LOCKE*, § 2951(2) PROVIDES NO BENEFITS TO RELIGION AND IMPOSES MORE THAN A "RELATIVELY MINOR BURDEN"

In distinguishing *Locke* from *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), this Court reasoned that the fact that Washington's "Promise Scholarship Program goes a long way toward including religion within its benefits" negated an inference of hostility towards religion. *Locke*, 540 U.S. at 724. This Court emphasized that Promise Scholars could attend pervasively religious colleges and take religion courses, including courses in devotional theology. With respect to Maine's tuitioning program, however, attending a pervasively religious high school and taking required religion courses means students are disqualified from having their tuition

paid. Because of § 2951(2), religion receives absolutely no benefits under the program.

Lukumi focused on hostility towards religion, because the challenged actions were facially neutral and the defendant's motivation converted an ostensibly neutral act into one hostile to religion. In this case, § 2951(2) on its face singles out religion for adverse treatment, and there is no need to seek out the motivation of its creators to make it an action based on religion. Similarly, *McDaniel v. Paty*, 435 U.S. 618 (1978), did not require that Tennessee's disqualification of ministers for state elective office be based on hostility or animus before it found a Free Exercise violation. What is common to these cases is that they all specifically and deliberately placed religion at a disadvantage not justified by Establishment Clause concerns.

If Maine had simply ordered John Bapst Catholic High School to close because it was a religious school, this Court would not have inquired as to whether that was a hostile act: it would have applied the *Lemon* test and found that closing the school had a primary effect of inhibiting or hindering religion.[31] That effect is in no way lessened by the fact that Maine killed Bapst by denying tuition payments to its students because it was a religious school. The effect is the same, closure of the school; the reason is the same, that it was religious. Before 1980

[31] This hypothetical is not quite as farfetched as it may sound. In *Bangor Baptist Church v. Maine Dep't of Educ. and Cultural Servs.*, 576 F. Supp. 1299 (D. Me. 1983), the federal district court rebuffed efforts by Maine's Attorney General and Education Commissioner *to close all unapproved religious schools*, at precisely the same time they told John Bapst Catholic High School and the other religious schools approved for tuition payments that they could no longer receive such payments.

Maine's tuitioning program included religion in its benefits, and afterwards it did not. Section 2951(2) treats religious schools and families like petitioners as second-class citizens by denying them the benefit of a publicly-funded secondary education at the school of their choice, while extending that benefit to others.

Locke found the loss of the scholarship imposed a relatively minor burden on Promise Scholars. This referred to the modest size of the scholarships ($2,667) and to the fact that one could retain the scholarship and still take devotional theology courses and attend religious colleges, as long as one did not declare a religion major. In *Anderson*, § 2951(2) denies the petitioners tuition payments, for four years of high school worth over $20,000. Moreover, secondary school attendance is compulsory and part of students' entitlement to a publicly-supported education. Thus, the benefit denied by § 2951(2) is both quantitatively larger and qualitatively different. To send their children to their high school of choice petitioners must sacrifice their entitlement to a state-supported secondary education, unlike parents preferring secular private or public schools.

CONCLUSION

In 1854 the Maine Supreme Court failed to protect Amanda Donahoe, a member of a newly-arrived religious minority, from religious discrimination. For refusing to participate in a religious exercise, she was expelled from school and denied a free public education. In 1980 the Maine Attorney General misapplied the principle of religious neutrality underlying the Establishment Clause

and caused a religious high school to close and students attending religious schools to lose their entitlement to tuition payments. In *Anderson* the Maine Supreme Court has again failed a religious minority, those individuals who prefer to send their children to religious schools. This denial discriminates against religion on its face and lacks a rational basis. As such, *Anderson* conflicts with decisions of this Court and two federal Circuit Courts, and egregiously overextends *Locke v. Davey*.

Petitioners respectfully request that this Court issue a writ of certiorari to review, reverse, and remand *Anderson*.

Respectfully submitted,

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APPENDIX A

JULIA ANDERSON et al. v. TOWN OF DURHAM et al.

Docket: Cum-04-591

SUPREME JUDICIAL COURT OF MAINE

2006 ME 39; 895 A.2d 944; 2006 Me. LEXIS 39

March 24, 2005, Argued; February 14, 2006, Reargued April 26, 2006, Decided

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JUDGES: Panel: SAUFLEY, C.J., and CLIFFORD, DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ.*

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* Justice Paul L. Rudman sat at the first oral argument and participated in the initial conference, but retired before this opinion was certified.

Although not available at the second oral argument, Justice Calkins participated in this opinion. *See* M.R. App. P. 12(a) (stating that a "qualified justice may participate in a decision even though not present at oral argument").

Majority: SAUFLEY, C.J., and DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ. Concurrence: SAUFLEY, C.J., and LEVY, J. Dissent: CLIFFORD, J.

OPINION BY: ALEXANDER

OPINION: ALEXANDER, J.

[*P1] In this case, we review again whether Maine's tuition payment statute, 20-A M.R.S. § 2951(2) (2005), violates the First and Fourteenth Amendments of the United States Constitution. The statute authorizes the use of public funds to pay tuition at approved private schools on behalf of students who live in districts that do not operate a public high school, provided the school is nonsectarian. We upheld section 2951(2) against a constitutional challenge in *Bagley v. Raymond School Department,* 1999 ME 60, 728 A.2d 127. The plaintiffs assert that a subsequent decision of the United States Supreme Court, *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002), that upheld the constitutionality of an Ohio tuition voucher program, has changed the law and compels a determination that the prohibition on payments for tuition to attend sectarian schools now violates the United States Constitution. More recent federal court decisions and our review of the current state of the law confirm that the choice the Legislature made in enacting section 2951(2) continues to be a valid, constitutional enactment. Accordingly, we affirm the summary judgment entered in the Superior Court (Cumberland County, Crowley, J.) holding that section 2951(2) is constitutional.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

[*P2] The constitutional requirements at issue in this case are stated in the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution.[1] The First Amendment states, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[*P3] The statute at issue is 20-A M.R.S. § 2951(2). Title 20-A M.R.S. § 2951 (2005) states in part: "A private school may be approved for the receipt of public funds for tuition purposes only if it: . . . (2) . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."

II. LEGAL HISTORY

[*P4] We extensively discussed the history and nature of section 2951(2) in *Bagley,* 1999 ME 60, ¶¶ 2-5, 728 A.2d at 130-31. Title 20-A authorizes the Department of Education and school districts to provide a public education in a variety of ways. A school district may build its own high school, or it may contract with another school district or private school that meets State school approval criteria for tuition purposes. 20-A M.R.S. § 2701 (2005). Parents in communities that do not have a public high school[2] may elect to send their children to a public high

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[1] The plaintiff parents in this case assert only federal constitutional claims.

[2] Title 20-A M.R.S. § 2701 (2005) applies to children in any grade. Only high school is at issue in this case.

school or an approved private school. *Id.* Public funds are used to pay to the selected high school a set amount towards tuition costs that is based on an anticipated public high school tuition cost, set pursuant to 20-A M.R.S. §§ 5805, 5806, 5808 (2005). School approval criteria include either accreditation by the New England Association of Colleges and Secondary Schools, or compliance with State requirements including basic instruction in designated curriculum,[3] certification of teachers, length of school day, and student-teacher ratios. 20-A M.R.S. §§ 2901, 2902 (2005).

[*P5] Before 1980, Maine's tuition statute permitted payment of public funds to approved sectarian schools for tuition payment purposes. In 1980, in response to an inquiry from a member of the Legislature, Maine's Attorney General issued an opinion stating that using public funds to pay tuition at private, religious schools violated the Establishment Clause. Op. Me. Att'y Gen. 80-2. The Legislature then enacted section 2951(2), which precluded sectarian schools from being approved for receipt of public tuition funds. P.L. 1981, ch. 693, § 5.

[*P6] The tuition payment statute imposes a number of obligations on schools that receive public tuition funds. It states:

> **§ 2951. Approval for tuition purposes**
>
> A private school may be approved for the receipt of public funds for tuition purposes only if it:

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[3] Pursuant to 20-A M.R.S. § 4722 (2005), secondary school curriculum requirements include English, social studies, mathematics, science (including a laboratory science) and fine arts.

1. Basic approval. Meets the requirements for basic school approval under subchapter I;

2. Nonsectarian. Is a nonsectarian school in accordance with the First Amendment of the United States Constitution;

3. Incorporated. Is incorporated under the laws of the State of Maine or of the United States;

4. Repealed. Laws 1983, c. 859, § A, 8.

5. Additional requirements. Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. Student assessment. Any school that enrolls 60% or more publicly funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of students; and

7. Release of student records. Upon the request of a school unit, release copies of all student records for students transferring from the private school to the school unit.

20-A M.R.S. § 2951 (2005).

[*P7] *Bagley* upheld section 2951(2) in the face of a First and Fourteenth Amendment challenge.[4] At that time,

[4] The parents in *Bagley* also asserted claims under the related provisions of the Maine Constitution. We addressed those claims "with the understanding that the rights guaranteed by the United States

(Continued on following page)

another group of parents brought suit in federal court challenging section 2951(2). The Court of Appeals for the First Circuit determined that section 2951(2) was constitutional in *Strout v. Albanese,* 178 F.3d 57, 66 (1st Cir. 1999).

[*P8] In *Zelman*, the United States Supreme Court upheld the constitutionality of an Ohio tuition voucher program that authorized the use of public funds to pay for a child's education at any approved school selected by the parents, including a religious school, determining that the particular program did not conflict with the Establishment Clause. 536 U.S. at 652-53.

[*P9] After the Supreme Court decided *Zelman*, a bill to repeal section 2951(2) was introduced in the Maine Legislature. L.D. 182 (121st Legis. 2003). The bill did not pass. Thereafter, the plaintiffs initiated this lawsuit to test the constitutional viability of section 2951(2) after *Zelman*. As before, a different group of parents brought suit in federal court, challenging section 2951(2) on similar grounds. The federal case culminated in a decision of the Court of Appeals for the First Circuit holding that, even after *Zelman*, the Constitution does not require the State of Maine to fund tuition at sectarian schools. *Eulitt v. State of Me., Dep't of Educ.,* 386 F.3d 344 (1st Cir. 2004). Also, in 2004, the United States Supreme Court, in *Locke v. Davey,* 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004), held that a publicly funded Washington State college scholarship program could, without violating the

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Constitution and the Maine Constitution are coextensive." *Bagley v. Raymond Sch. Dep't,* 1999 ME 60, ¶13, 728 A.2d 127, 132.

constitution, prohibit use of the funds for pursuit of a devotional theology degree. *Id.* at 725.

III. FACTUAL AND PROCEDURAL HISTORY

[*P10] The facts in this case are largely stipulated and are not in dispute. The plaintiffs are parents of high school age children who reside in Minot, Raymond, and Durham.[5] The school administrative units within these towns do not operate a public high school. Minot has contracted with the Town of Poland to provide a secondary education to ninety per cent of Minot's students. A student's family may apply to attend another high school, and approval is given on a case-by-case basis, based on educational program requirements.

[*P11] Raymond has contracted with the Town of Windham to take fifty percent of Raymond's high school students beginning in 2003.[6] The City of Westbrook has agreed to enroll as many of Raymond's high school students as Raymond wishes. As of October 1, 2003, twenty-five high

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[5] As this action has been pending for some time, it is likely that the school attendance of some of the individuals who were attending high school when suit was filed has changed. However, there is no question that the issue presented for decision by this action is a question of great public concern and an issue that repeatedly arises for parents of children attending high school in communities that tuition their high school students to other public and private high schools. Thus, this case appropriately proceeds under generally recognized exceptions to the mootness doctrine. *See Consumers for Affordable Health Care, Inc. v. Superintendent of Ins.*, 2002 ME 158, ¶¶ 18-19, 809 A.2d 1233, 1239-40; *Me. Civil Liberties Union v. City of S. Portland*, 1999 ME 121, ¶10, 734 A.2d 191, 195.

[6] The dates referenced in this opinion reflect the most current information available from the Superior Court record.

school students from Raymond, supported by public funds, attended approved private high schools.

[*P12] Durham does not have a contract with any neighboring school district, but most of its high school students attend Brunswick High School. As of April 1, 2004, three high school students from Durham attend approved private high schools with public funds.

[*P13] The plaintiffs are parents who have elected to send their children to private religious schools that do not qualify as nonsectarian schools for payment of tuition with public funds. For the 2002-2003 school year, one student attends a pervasively sectarian[7] Seventh Day Adventist school. Courses in the religion are required, and students must attend chapel and religious assemblies. Students at these schools cannot avoid Seventh Day Adventist teachings.

[*P14] The remaining students attend St. Dominic's Regional High School in Auburn. St. Dominic's is a private, pervasively sectarian Roman Catholic High School operated under the authority of the Roman Catholic Bishop of Portland. Its admissions policy gives preference to students whose families are registered members of Catholic parishes. Participation in religious classes and the spiritual life of the school is mandatory, and students cannot avoid Catholic teachings. Applicants for teaching positions must mirror "gospel values" and understand the role of the school as a "unique pastoral, educational agency of the church." Some of the parents chose St. Dominic's because

[7] A school is pervasively sectarian when a "substantial portion of its functions are subsumed in the religious mission." *Hunt v. McNair*, 413 U.S. 734, 743, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973).

of its academic program and what they perceive as a stronger level of discipline; some because of sports opportunities; some because the school promotes their sincerely held beliefs as Catholics.

[*P15] None of the parties asserts that their religious beliefs mandate that they send their children to religious schools.

[*P16] The parents brought this action against each of the Towns, the Town School Departments, and Town School Superintendents (the Town Defendants), as well as the Maine Department of Education and the Commissioner (the State). They seek (1) a declaratory judgment that section 2951(2) violates the Establishment, Free Exercise, and Equal Protection clauses of the First and Fourteenth Amendments to the United States Constitution; (2) an injunction that would forbid the Town Defendants from enforcing section 2951(2); and (3) reimbursement from the Towns for tuition paid to the religious schools, attorney fees, and costs. The parents seek to hold the Town Defendants liable pursuant to 42 U.S.C.A. § 1983 (West 2003), on the ground that they deprived plaintiffs of their constitutional rights under color of state law.

[*P17] The Maine Civil Liberties Union and nine residents of the Town of Raymond have intervened as defendants in support of the continuing validity of section 2951(2).

[*P18] The trial court granted in part the Town Defendants' motions to dismiss, on the ground that the complaint failed to state a claim upon which relief may be granted pursuant to 42 U.S.C.A. § 1983. After discovery, the remaining parties filed cross-motions for summary

judgment. The parties filed an extensive joint stipulation of facts, as well as separate statements of material facts. The Superior Court entered a summary judgment in favor of the State, holding that section 2951(2) did not violate the Constitution. The parents appeal both the order dismissing the Town Defendants and the summary judgment entered in favor of the State. Because we determine that section 2951(2) does not violate the United States Constitution, we do not reach the issues raised on appeal from the order dismissing the Town Defendants.

IV. GOVERNING PRECEDENTS

A. Standard of Review

[*P19] We review trial court rulings on issues of law and statutory interpretation de novo. *See Ashe v. Enter. Rent-A-Car,* 2003 ME 147, ¶7, 838 A.2d 1157, 1159. When reviewing the constitutionality of a statute, we "begin with the basic principle of statutory construction that 'this Court is bound to avoid an unconstitutional construction of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements.'" *Bagley,* 1999 ME 60, ¶14, 728 A.2d at 133 (internal citations omitted).

[*P20] In our review of the constitutional issues presented in this case, we are aided by our own precedent and by recent opinions of federal courts that inform our decision-making on all major issues presented to us in this appeal. Accordingly, we recount our holding in *Bagley,* examine the law as it has evolved since we decided *Bagley,* and analyze the impact of current law on the claims before us.

B. *Bagley v. Raymond School Department*

[*P21] In *Bagley,* after reviewing First and Fourteenth Amendment jurisprudence involving public funding of religious schools, we determined that section 2951(2) did not violate those constitutional provisions. 1999 ME 60, ¶72, 728 A.2d at 147. We stated that the issue was *not* whether a particular program in which state funds are used to benefit religious schools violates the constitution, but whether a "tuition program that specifically *excludes* religious schools" does so. *Id.* ¶11, 728 A.2d at 132 (emphasis added). The inquiry is the same in the current challenge to section 2951(2).

[*P22] We undertook our analysis in *Bagley* in three parts, examining separately whether section 2951(2) violates the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution.

1. Free Exercise Clause

[*P23] The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . . " U.S. CONST. amend. I.[8] Upon a challenge to government action on Free Exercise grounds, the inquiry is "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Bagley,* 1999 ME 60, ¶16, 728 A.2d at 133 (quoting *Hernandez v.*

[8] The religion clauses of the First Amendment are applicable to the states. *Cantwell v. Conn.*, 310 U.S. 296, 303-04, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

Comm'r, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989)).

[*P24] The party challenging a statute on free exercise grounds must initially demonstrate that: (1) the activity burdened by the regulation is motivated by a sincerely held religious belief; and (2) the challenged regulation restrains the free exercise of that religious belief. *Blount v. Dep't of Educ. & Cultural Servs.,* 551 A.2d 1377, 1379 (Me.1988). If the challenger meets that initial burden, the burden shifts, and the State can prevail only by proving that (1) the challenged regulation is motivated by a compelling state interest, and (2) no less restrictive means can adequately achieve that compelling state interest. *Id.*

[*P25] The parents in *Bagley* contended that section 2591(2) violates the Free Exercise Clause by burdening their fundamental right to send their children to religious schools. Because it is "not within the judicial ken to question the centrality of particular beliefs," *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (quoting *Hernandez,* 490 U.S. at 699), we assumed *arguendo* that the parents' desire to send their children to religious schools was motivated by a sincerely held religious belief. 1999 ME 60, ¶18, 728 A.2d at 134. We determined, however, that no substantial burden had been placed on activity motivated by religious belief, because a statute that merely operates to make the practice of an individual's religious beliefs more expensive does not violate the Free Exercise Clause. *Id.* (citing *Goodall v. Stafford County Sch. Bd.,* 60 F.3d 168, 171 (4th Cir. 1995)). We further observed that the parents were "no more impaired in their efforts to seek a religious education for their

[children] than are parents of children in school districts that provide only a free nonreligious education in public schools." *Bagley,* 1999 ME 60, ¶18, 728 A.2d at 135.

2. Establishment Clause

[*P26] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. It prevents a state from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion, *Agostini v. Felton,* 521 U.S. 203, 222-23, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), or from creating an excessive entanglement between government and religion,[9] *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). While the Free Exercise Clause addresses the "negative" by prohibiting the government from interfering with religious practice, the Establishment Clause addresses the "affirmative" by prohibiting the government "from sponsoring or establishing a religion."[10] *Bagley,* 1999 ME 60, ¶21, 728 A.2d at 135.

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[9] In *Agostini v. Felton,* 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), the Supreme Court described the inquiry into whether a government aid program gave rise to excessive entanglement between the government and religion as part of the inquiry into whether the program had the impermissible primary effect of aiding or inhibiting religion. *Id.* at 232. The Court essentially collapsed the three-part purpose-effect-entanglement test, commonly referred to as the "Lemon" test, into a two-part inquiry, examining the excessive entanglement prong in terms of whether the challenged activity has the effect of advancing religion. *Id.*; *see also Bagley,* 1999 ME 60, ¶46, 728 A.2d at 141.

[10] For example, the United States Supreme Court has held that the Establishment Clause prohibits government action that creates a denominational preference among religions, *Larson v. Valente,* 456 U.S.

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[*P27] We determined in *Bagley* that there is "no support for the proposition that the Establishment Clause prevents a state from refusing to fund religious schools." *Id.* ¶22, 728 A.2d at 135-36. We reasoned:

> Distilled to its essence, the Establishment Clause prohibits the government from supporting or advancing religion and from forcing religion, even in subtle ways, on those who choose not to accept it. It has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion.

Id. (footnote omitted). Accordingly, we determined that the prohibition against approving religious schools to receive public tuition funds did not violate the Establishment Clause. *Id.*

3. Equal Protection Clause

[*P28] The Equal Protection Clause of the Fourteenth Amendment forbids any state from denying "to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1, and requires, generally, that persons similarly situated be treated alike. *See Plyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 72

228, 246, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 714, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994) (O'Connor, J., concurring), and prohibits the improper delegation of government authority to a religious entity, *Grumet,* 512 U.S. at 696-97 (opinion of Souter, J.).

L. Ed. 2d 786 (1982). Article 1, section 6-A of the Maine Constitution includes similar requirements.[11]

[*P29] If government action that is challenged on equal protection grounds infringes on a fundamental constitutional right, or involves an inherently suspect classification such as race, it is subject to analysis under the strict scrutiny standard. *Sch. Admin. Dist. No. 1 v. Comm'r, Dep't of Educ.*, 659 A.2d 854, 857 (Me.1995). Strict scrutiny requires that the challenged action be narrowly tailored to achieve a compelling governmental interest. *See Butler v. Supreme Judicial Court,* 611 A.2d 987, 992 (Me.1992). If the government action does not implicate either a fundamental right or a suspect class, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *Sch. Admin. Dist. No. 1,* 659 A.2d at 857. When a statute is reviewed under the rational basis standard, it bears a strong presumption of validity. *See id.* Under the rational basis standard, the burden is on the party challenging the government action to demonstrate that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Eulitt,* 386 F.3d at 356.

[*P30] In *Bagley,* we did not address which level of scrutiny should be applied in analyzing whether section 2951(2) violated the Equal Protection Clause. Because the State proffered only one justification for the statute – compliance with the Establishment Clause – we determined

[11] Article I, § 6-A of the Maine Constitution states: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."

that the Establishment Clause analysis would define the scope of our Equal Protection inquiry. *Bagley,* 1999 ME 60, ¶32, 728 A.2d at 138. We reasoned as follows:

> If the exclusion of religious schools is not required by the Establishment Clause of the First Amendment, it must be struck down because the State offers no other reason for its existence. If the exclusion is required in order to comply with the Establishment Clause, the State will have presented a compelling justification for the disparate treatment of religious schools, and the parents' Equal Protection claim will fail. *See Widmar v. Vincent,* 454 U.S. 263, 271, 102 S. Ct. 269, 70 L. Ed. 2d 400 . . . (1981) (agreeing that compliance with constitutional obligations "may be characterized as compelling.").

Id. ¶33, 728 A.2d at 138.

[*P31] Even though the Supreme Court had begun to relax the strict prohibition against channeling public funds, at least indirectly, to religious schools,[12] we concluded that

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[12] *See Agostini,* 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (overruling *Aguilar v. Felton,* 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985) in which the Court had concluded that Establishment Clause was violated when public school teachers assisted underprivileged children in religious schools); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) (determining that Establishment Clause not violated when state paid for sign language interpreter for student at religious school); *Witters v. Wash. Dep't of Servs. for the Blind,* 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986) (holding grant of aid to a blind college student for ministerial training did not violate Establishment Clause); *Mueller v. Allen,* 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983) (upholding Minnesota law allowing taxpayers to deduct expenses incurred in providing education to children without regard to whether the school is religious).

the then-current Establishment Clause jurisprudence required Maine to continue to exclude religious schools from approval for state paid tuition. *Id.* ¶¶ 60-61, 728 A.2d at 144-45. We therefore upheld section 2951(2) on equal protection grounds. *Id.*

[*P32] Shortly thereafter, the First Circuit, presented with a similar constitutional challenge to section 2951(2), came to substantially the same conclusions that we had reached in *Bagley. Strout,* 178 F.3d at 66.

C. *Zelman v. Simmons-Harris*

[*P33] In *Zelman*, a group of Ohio taxpayers filed suit to enjoin an Ohio tuition assistance program that provided public funds for tuition at schools of the parents' choice, including private, religious schools. 536 U.S. at 648. The program had been enacted in response to a crisis in the Cleveland public schools. *Id.* at 644. All of the schools in the district were failing, and the federal district court had placed the entire school district under State control. *Id.* The State enacted the program "to provide educational choices to families with children who reside in the . . . District," where few parents in the district had the means to send their children to private schools. *Id.* at 643-44.

[*P34] Any private school, religious or nonreligious, was eligible to participate in the program, provided it was located within or adjacent to a covered district and met statewide educational standards. *Id.* at 645. Participating schools had to agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or

religion." *Id.* (quotation marks and citation omitted.) Tuition aid was distributed to parents according to financial need. *Id.* at 646. "Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school." *Id.* In the 1999-2000 school year, ninety-six percent of the children who participated in Ohio's tuition assistance program enrolled in religious-affiliated schools. *Id.* at 647.

[*P35] The Supreme Court determined that the Ohio program did not violate the Establishment Clause. The Court focused not on whether a religious institution benefited from receipt of public funds, but on the fact that the funds were channeled indirectly to that institution as a result of private choice. *Id.* at 652-53. The Court reasoned as follows:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id. at 652. Thus, after *Zelman*, public tuition subsidies to students to attend sectarian educational institutions may be permissible under the Establishment Clause if the financial assistance program has a valid secular purpose, provides benefits to a broad spectrum of individuals who can exercise genuine private choice among religious and secular options, is paid through the students' parents, and is neutral toward religion. *Id.*

D. *Locke v. Davey*

[*P36] In *Locke*, the Supreme Court again addressed application of the First Amendment to educational funding issues. The Court upheld a Washington State college scholarship program that prohibited the use of scholarship funds for pursuit of a devotional theology degree. 540 U.S. at 725. The restriction was authorized by Washington's state constitution.[13] In upholding the restriction, the Court reaffirmed that "'there is room for play in the joints'" between the religion clauses. *Id.* at 718 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)). By this, the Court meant that "there are some state actions permitted by the Establishment

[13] State constitutional provisions, such as the one in *Locke*, that expressly forbid aid to religious schools to different degrees, may continue to present a barrier for state legislatures seeking to expand options for publicly funded education to religious schools. Krista Kafer, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439, 450-51 (2003). Many of these provisions, known as "Blaine Amendments" for the Maine Senator who unsuccessfully championed a similar proposed amendment to the United States Constitution, have their roots in conflicts between supporters of public schools and supporters of religious, often Catholic, schools in the late nineteenth century. *See Bagley*, 1999 ME 60, ¶13 n.8, 728 A.2d at 132-33. The Maine Constitution does not contain a Blaine Amendment. *Id.*

Clause but not required by the Free Exercise Clause." *Id.* at 719.

[*P37] The Court in *Locke* indicated that *Zelman* stands for the proposition that under the Establishment Clause, "the link between government funds and religious training is broken by the independent and private choice of recipients." *Id.* at 719. Thus, the Court noted, if Washington State wished, it could, consistent with the Establishment Clause, *permit* scholarship recipients to pursue a degree in devotional theology. *Id.* The issue in *Locke* was whether Washington could *deny* such funding without violating the Free Exercise Clause. *Id.* The Court determined that it could. *Id.* at 725.

[*P38] Because the Court in *Locke* found no free exercise violation, it subjected the plaintiff's due process claim to rational basis scrutiny. *Id.* at 720 n.3. The Court noted that Washington State has a "historic and substantial" interest in not funding the pursuit of devotional degrees in order to avert the practice of state-sponsored clergy, a hallmark of established religion, which justified the limitation. *Id.* at 722, 725. Thus, the Court upheld the scholarship limitation, concluding, "[i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

E. *Eulitt v. State of Maine Department of Education*

[*P39] The parents in *Eulitt,* argued that the State's asserted interest in maintaining the sectarian school exclusion in order to avoid an Establishment Clause violation was no longer valid after *Zelman,* undermining the First Circuit's decision in *Strout.* 386 F.3d at 348-49.

[*P40] Because it concluded that the Free Exercise Clause "defines the scope of the fundamental right to religion incorporated by the Fourteenth Amendment's equal protection guarantee," *id.* at 353, the *Eulitt* court assessed whether section 2951(2) comports with the Free Exercise Clause, and then applied rational basis scrutiny "to any further equal protection inquiry," *id.* at 354. The court held that section 2951(2) imposes no impermissible burden on religion because it does not prohibit attendance at religious schools or prevent parents from choosing religious education for their children. *Id.* at 354-55. It reasoned that the guarantee of protection from government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they fund the secular equivalent of that activity. *Id.*

[*P41] Finding that section 2951(2) did not violate the parents' free exercise rights, the court stated that "we have no occasion to ponder whether Maine's Establishment Clause defense constitutes a compelling interest that justifies the challenged restriction." *Id.* at 356. The court applied rational basis scrutiny to the statute, pursuant to which the burden was on the parents as challengers of the statute to demonstrate that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Id.* In *Eulitt,* the parents conceded that if the rational basis test applied, their equal protection claim failed as a matter of law. *Id.*

[*P42] The Court in *Eulitt* read *Locke* broadly, stating that "the decision there recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with

religion, even though the Establishment Clause may not require them to do so." *Id.* at 355.

V. ANALYSIS OF ISSUES

A. Motivation for Adoption of Section 2951(2)

[*P43] In the 1970s and early 1980s the trend in United States Supreme Court decision-making on Establishment Clause/Free Exercise issues strongly disfavored use of public funds for direct or indirect payments to religious institutions, including religious schools. *See Aguilar,* 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (holding that Establishment Clause prohibited sending public school teachers into private, religious schools to provide remedial education to disadvantaged children);[14] *Wolman v. Walter,* 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977) (holding provision of instructional materials and transportation services to religious schools is not permitted; therapeutic services could be provided to religious school students off-site; funding for secular textbooks, testing, and diagnostic services upheld), *overruled in part by Mitchell v. Helms,* 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000); *Meek v. Pittenger,* 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975) (striking down in part a Pennsylvania law that provided loans of educational materials to religious schools), *overruled in part by Mitchell,* 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660; *Comm. for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973) (invalidating New York

[14] The result in *Aguilar* was changed by *Agostini,* 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, to allow such uses of remedial education personnel.

tax laws that provided direct money grants to qualifying non-public schools for maintenance and repair of facilities and equipment); *Lemon,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (invalidating programs that provided salary supplements to teachers of secular subjects in religious schools).

[*P44] This trend in Federal Court decision-making regarding cash payments that would go directly or indirectly to religious institutions, although relaxed somewhat in the late 1980s and early 1990s,[15] continued to influence United States District Court and Court of Appeals decisions, including the lower court decisions in *Zelman.*[16]

[*P45] Many of the actions that challenged use of public funds for religious purposes included claims for violation of civil rights pursuant to 42 U.S.C.A. § 1983, for injunctive relief, and for attorney fees pursuant to 42 U.S.C.A. § 1988. In 1983 actions, attorney fees could be awarded whether a party prevailed on the § 1983 claim or other grounds. *Farrar v. Hobby,* 506 U.S. 103, 109, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). Further, state and local governments and officials faced a greater risk of liability and attorney fee awards where it could be demonstrated that they were aware that the challenged government actions were violative of constitutional rights and had failed to take corrective action. *Wood v. Strickland,* 420 U.S. 308, 322, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975) (holding school officials liable when they knew action

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[15] *See* n.12 and opinions cited therein.

[16] *Simmons-Harris v. Zelman,* 234 F.3d 945, 965 (6th Cir. 2000) (Ryan, J., concurring in part, dissenting in part); *Simmons-Harris v. Zelman,* 72 F. Supp. 2d 834, 853 (N.D. Ohio 1999).

taken would cause a deprivation of students' constitutional rights), *overruled in part by Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Hutto v. Finney,* 437 U.S. 678, 691-92, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) (upholding imposition of substantial attorney fee award where prison officials failed to correct Eighth Amendment violations that were the subject of a prior court order).

[*P46] Had the tuition subsidy program continued as it existed in 1980, paying public funds for tuition to religious schools, the program faced a high risk of a successful challenge that could have resulted in disruption of the entire tuition subsidy effort and a costly attorney fee award to be paid by Maine taxpayers. Thus, in the legal climate of 1980, the Maine Attorney General gave good advice regarding the propriety of using public funds to pay tuition at religious schools. The Maine Legislature acted prudently and responsibly in taking that advice and enacting section 2951(2).

[*P47] The actions of the Attorney General and the Legislature were not motivated by any religious animus and were motivated by a desire to respect and comply with the requirements of the Establishment Clause as then interpreted and applied by the United States Supreme Court.

B. Free Exercise and Limitation of Choice

[*P48] The parents assert that the government, when making a range of choices available to a group, may not limit those choices on the basis of religion without violating the Free Exercise Clause. The failure to consider

the neutrality problem, they argue, undermines the Free Exercise and Establishment Clause holdings in *Bagley.*

[*P49] A statute that is not neutral but either disfavors religion on its face or has been motivated by animosity against religion is subjected to heightened judicial scrutiny and can be justified only upon a demonstration of a compelling governmental interest in the statute. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531-32, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). A statute that is neutral and of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice. *Smith,* 494 U.S. at 879-80; *Goodall,* 60 F.3d at 171, *cert. denied,* 516 U.S. 1046, 116 S. Ct. 706, 133 L. Ed. 2d 661.

[*P50] In *Locke,* the Supreme Court rejected the argument that the scholarship restriction was presumptively unconstitutional because it was not neutral with respect to religion, citing *City of Hialeah. Locke,* 540 U.S. 720. In *Hialeah,* the City had adopted ordinances that made it a crime to slaughter animals for reasons other than food consumption. The Supreme Court determined that, although neutral on their face, the ordinances were unconstitutional because they were aimed at suppressing the practice of ritualistic animal sacrifice among members of the Santeria religion. The Court found overwhelming evidence in the record that animosity against the Santeria religion had motivated the ordinances' passage, and struck them down. *Id.* at 535, 546.

[*P51] The Court in *Locke* distinguished the scholarship restriction from the ordinances in *Hialeah,* finding that although not neutral on its face, the scholarship

restriction nevertheless withstood constitutional challenge because

> [Washington's program] imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

540 U.S. at 720-21 (citations omitted) (footnote omitted).

[*P52] The *Eulitt* court assessed whether, after *Locke,* section 2951(2) was unconstitutional on the ground of non-neutrality. The court held that the mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity against religion, and found that the record contained no evidence that the statute had been motivated by such animosity. 386 F.3d at 355. Analyzing the factors set forth in *Locke* and *Hialeah,* the *Eulitt* court stated:

> Maine's decision not to extend tuition funding to religious schools does not threaten any civil or criminal penalty. By the same token, it does not in any way inhibit political participation. Finally, it does not require residents to forgo religious convictions in order to receive the benefit offered by the state – a secular education.

Id.

[*P53] In *Bagley* we suggested that section 2591(2) was not neutral on its face, and we subjected the statute to strict scrutiny. 1999 ME 60, ¶16 n.10, 728 A.2d at 133-34. Because we determined that the statute did not substantially

burden a religious practice, however, our analysis ended there. *Id.* ¶20, 728 A.2d at 135. The statements in *Bagley* regarding strict scrutiny did not have the benefit of the analysis in *Locke* and *Eulitt,* which clarified that a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice. *Locke,* 540 U.S. at 720; *Eulitt,* 386 F.3d at 356. Although, with the benefit of the analysis in *Locke,* it is unnecessary to apply a strict scrutiny analysis, we continue to adhere to the view expressed in *Bagley* that section 2591(2) does not substantially burden a religious practice.

[*P54] A burden upon religion exists when "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.,* 450 U.S. 707, 717-18, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). None of the parties in this case has asserted that attendance at public or secular private schools is proscribed by their faith, or that they are being punished for engaging in conduct mandated by their faith, or that the statute places any pressure on them to modify their beliefs. The statute merely prohibits the State from funding their school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner.

[*P55] The fact that after *Zelman* the Legislature could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause does not support a presumption that religious hostility motivates the decision to continue the religious school exclusion. *Locke*

recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause.

C. Equal Protection and Rational Basis Analysis

[*P56] After *Zelman,* state payments for education that reach a religious school indirectly as the result of a free and independent choice of parents would not violate the Establishment Clause. This Court in *Bagley* and the First Circuit in *Strout* suggested that if the religious school exclusion were based on an erroneous understanding of the Establishment Clause, the statute could violate Equal Protection. *Bagley,* 1999 ME 60, ¶32, 728 A.2d at 138; *Strout,* 178 F.3d at 64 n.12. However, *Locke* and *Eulitt* have clarified that when performing the equal protection analysis in religious school funding cases, strict scrutiny applies only to the claim that the parents' fundamental right to the free exercise of religion is implicated; all other claims of religious discrimination are subject to rational basis scrutiny. *Locke,* 540 U.S. at 720 n.3; *Eulitt,* 386 F.3d at 354. Because we have found no free exercise violation, we apply the rational basis test. That test requires only that a fairly conceivable set of facts establish a legitimate government interest that would support the challenged classification. *Id.*

[*P57] The State proffers several justifications for section 2951(2), including Establishment Clause concerns not necessarily governed by *Zelman,* such as excessive entanglement between religion and state. Additional legitimate interests that the State offers include concerns about maintaining diversity within the public schools, and

avoiding involvement in discrimination in admissions and hiring by religious schools.

[*P58] The parents argue that the State is barred from offering additional, hypothetical rationales for the statute because the actual rationale is known, citing *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975). The Court stated in *Wiesenfeld* that a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not have been* a goal of the legislation." *Id.* (emphasis added). This is a different proposition from stating that only the precise purposes articulated by members of the Legislature and recorded in the legislative record may be considered. Thus, we are not bound by the justification proffered by the State in support of the statute in *Bagley,* or offered in support of the legislation in 1981. The justifications for the statute asserted by the State now are not inconsistent with or contradictory to prior stated goals. Avoiding excessive entanglement between religion and state, a component of compliance with the Establishment Clause, was an original justification for the statute, and is asserted by the State in this litigation.

[*P59] A court undertaking an excessive entanglement analysis ordinarily does so in the context of reviewing a state program that provides aid to religious institutions. *Bagley,* 1999 ME 60, ¶67 n.35, 728 A.2d at 146. Because we operate in terms of conceivable justifications, we can evaluate the hypothetical situation in which the State authorizes funding for tuition at sectarian schools. It remains conceivable, even after *Zelman,* that under some set of facts, funding tuition for sectarian

schools would run afoul of the Establishment Clause on excessive entanglement grounds. Furthermore, we cannot be certain that twenty-four years later, any sectarian schools would wish to accept entanglements that might arise from state oversight.[17]

[*P60] The record in this case is sparse as to the nature of the courses taught at the religious schools and their religious practices. Because the religious schools are not participating in this case, those issues are not central to our decision-making. However, it is possible to envision that there may be conflicts between state curriculum, record keeping and anti-discrimination requirements and religious teachings and religious practices in some schools. These conflicts could result in significant entanglement of State education officials in religious matters if religious

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[17] In this case, the parents have indicated that they are asserting only their rights, and that they are not attempting to assert rights of religious schools. Thus, no issue exists as to whether the parents have standing to assert alleged discrimination against the schools. In *Bagley*, because the case presented "an important issue worthy of evaluation," we reconfigured the parents' equal protection claim from one asserting the rights of the schools to the argument "that the parents' lack of opportunity to have the State pay the tuition for their children to attend a private religious school results in their own disparate treatment on the basis of their religion." 1999 ME 60, ¶26, 728 A.2d at 136 (emphasis omitted).

In *Eulitt v. State of Maine*, 386 F.3d 344 (2004), the First Circuit determined that the parents did not have standing to assert the claim that the State must fund private religious education to the extent it would fund private secular education. That claim, the court ruled, must be asserted by the schools. *Id.* at 352-53. The court found no basis to support third-party standing on that issue. *Id.* The court did determine that the parents had standing to seek an injunction against enforcement of section 2951(2) and a declaration of the statute's unconstitutionality. *Id.* at 353. The court therefore proceeded to address the merits of the case.

schools were to begin to receive public tuition funds and the State moves to enforce its various compliance requirements on the religious schools. This concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation in section 2951(2). Parental choice of the school does not sever the religion-state connection when payment is made by a public entity to the religious school and that payment subjects a school's educational and religious practices to state regulation.

VI. CONCLUSION

[*P61] After *Zelman*, the State may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* and *Eulitt* hold that it is not compelled to do so. Section 2951(2) falls within the "play in the joints" between the two religion clauses. Section 2951(2) neither improperly infringes on the free exercise of religion, nor violates the Establishment Clause. With respect to the parents' claim of religious discrimination based on the Equal Protection Clause, the statute does not infringe upon the fundamental right to free exercise of religion in a constitutionally significant manner. The remaining claims of religious discrimination are subject only to rational basis scrutiny. The State has supplied a reasonably conceivable set of facts that establish a rational relationship between the statute and a legitimate government interest in avoiding excessive entanglements with religion.

The entry is:

Judgment affirmed.

CONCUR BY: LEVY

CONCUR: LEVY, J., with whom SAUFLEY, C.J., joins, concurring.

[*P62] In addition to the constitutional issues addressed by the Court, this case presents an important question of law concerning municipal liability that remains unaddressed.

[*P63] The nine municipal defendants consist of three Maine communities – Durham, Minot, and Raymond – and their school departments and school superintendents. In the early stages of this proceeding, the Superior Court dismissed the action as to eight of the nine defendants[16] because it concluded, in a reasoned decision applying *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and its progeny, that they cannot be held liable under 42 U.S.C.A. § 1983 (West 2003) for merely complying with and enforcing Maine's school voucher statute, 20-A M.R.S. § 2951 (2005). Before us, the plaintiffs contend that the Superior Court erred as to the three school departments and their superintendents, asserting that these defendants can be held liable under § 1983 even if Maine's tuition payment law left them "no choice in this matter other than to disobey state law."

[*P64] The plaintiffs' assertion that school districts and their superintendents may be found liable for failing to disobey an act of the Legislature presents a question of

[16] The Superior Court (Cumberland County, Mills, C.J.) had previously dismissed the claims against the ninth municipal defendant, the Town of Minot.

great public interest, thus qualifying as one of our recognized exceptions to the mootness doctrine. *See Ten Voters of City of Biddeford v. City of Biddeford,* 2003 ME 59, ¶9, 822 A.2d 1196, 1200. Our decision in *Bagley v. Raymond School Department,* 1999 ME 60, 728 A.2d 127, also demonstrates that this question will escape review and reoccur in the future, therefore qualifying as another recognized exception to the mootness doctrine. *Ten Voters of City of Biddeford,* 2003 ME 59, ¶8, 822 A.2d at 1200. In *Bagley,* the trial court determined that the Raymond School Department could not be held liable pursuant to § 1983 for enforcing Maine's school voucher statute, but, as here, we limited our appellate review to the constitutional questions presented and did not reach the municipal liability question. 1999 ME 60, ¶10, 728 A.2d at 131.

[*P65] The purpose of this lawsuit is to test the constitutionality of Maine's tuition payment law, 20-A M.R.S. § 2951, a statute administered by the Maine Department of Education. I would reach the municipal liability issue that it presents because our resolution of that issue will provide guidance as to whether local governments and their officials should be made defendants in, and compelled to incur the expenses arising from, lawsuits that do not implicate their policies or discretionary acts.

DISSENT BY: CLIFFORD

DISSENT: CLIFFORD, J., dissenting.

[*P66] Title 20-A M.R.S. § 5204(4) (2005) allows parents residing in towns that lack public school systems to choose the schools their children attend by providing for tuition to be paid to public or private schools in other municipalities. Prior to a 1983 amendment to Maine's tuition statute, section 5204(4) was neutral toward religion, and

families residing in towns without their own public schools enjoyed a unique opportunity to send their children to private schools, including sectarian schools. The system worked very well, and offered parents broad choices in the education of their children, choices otherwise enjoyed only by families of some economic means.[19]

[*P67] The tuition statute's neutrality toward religion ended in the early 1980s, however, when 20-A M.R.S. § 2951(2) (2005) was enacted to limit those private schools approved for the receipt of public tuition funds to "nonsectarian school[s] in accordance with the First Amendment of the United States Constitution." P.L. 1981, ch. 693, § 5. This amendment denied parents the opportunity to send their children to sectarian schools within the program established by section 5204(4). The amendment was enacted following an opinion issued by the Attorney General, and was justified *solely* because it was thought at that time to be required by the Establishment Clause of the First Amendment to the United States Constitution. The amendment substantially altered a unique program that benefited Maine families.

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[19] Persuasive literature exists to indicate that school choice programs not only provide a good education to students, but also that they are cost effective as well. *See, e.g.*, Brad P. Bender, Comment, *"Allegiance to Our Children": The School Choice Debate in the Commonwealth of Pennsylvania*, 104 DICK. L. REV. 165 (1999); Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON IND. L. REV. 7 (1993); Scott Fenton, Comment, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 CAP. U. L. REV. 645 (1997); Krista Kafer, Article, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439 (2003); James A. Peyser, Symposium: *Issues in Education Law and Policy-School Choice: When, Not If*, 35 B.C. L. REV. 619 (1994).

[*P68] In *Bagley v. Raymond School Department,* the plaintiffs challenged the constitutionality of section 2951(2). 1999 ME 60, ¶1, 728 A.2d 127, 130, *cert. denied,* 528 U.S. 947, 120 S. Ct. 364, 145 L. Ed. 2d 285 (1999). In rejecting that challenge, this Court concluded that the statute's explicit discrimination against parents who desire to send their children to private sectarian schools was justified because, as the State contended, the prohibition on the payment of tuition for religious-affiliated schools was compelled by the Establishment Clause of the United States Constitution. *Id.* ¶33, 728 A.2d at 138. This Court stated:

> [t]he State offers only one justification for the statute – an effort to comply with the Establishment Clause. Accordingly, it makes little difference whether we classify the level of scrutiny as strict or requiring only a rational basis. If the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny.

Id. ¶32, 728 A.2d at 137-38.

[*P69] Subsequent to this Court's decision in *Bagley,* however, the United States Supreme Court concluded that tuition payments by a municipality that enable families to send their children to sectarian schools do *not* violate the Establishment Clause of the United States Constitution as long as the statutory program pursuant to which the payment is made is neutral as to religion, and the choice of the religious school is the free and independent decision of the parents. *Zelman v. Simmons-Harris,* 536 U.S. 639, 652, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002). Because the language of section 5204(4) is neutral as to religion, and does provide parents with the choice of the school their

child will attend, it is abundantly clear from the decision in *Zelman* that the Establishment Clause does *not* require the prohibitory language of section 2951(2). *See Locke v. Davey,* 540 U.S. 712, 719, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (citing *Zelman,* 536 U.S. at 652).

[*P70] Relying on *Locke,* a United States Supreme Court case decided subsequent to *Zelman*, this Court concludes that, although it is clear that Maine *could* repeal section 2951(2) and again make section 5204(4) neutral as to religion, as it once was, and could reinstate tuition aid to parents who reside in towns without public schools and who choose to send their children to sectarian schools without violating the Establishment Clause, the elimination of the discriminatory provision of section 2951(2) is not required.

[*P71] Because this Court reads *Locke* as authorizing the explicit discrimination of section 2951(2), it applies a rational basis test to the equal protection claim of the plaintiffs, and accepts the State's argument that there is a rational basis to justify the unequal treatment of parents who desire to send their children to sectarian schools expressed in section 2951. Because, in my view, this Court reads *Locke* far more broadly than it should, and applies the wrong test to determine whether section 2951(2) violates the Equal Protection Clause, I respectfully dissent.

[*P72] The State of Washington maintains a post-secondary scholarship program for academically gifted students. The Supreme Court concluded in *Locke* that the State of Washington could refuse to provide scholarship funds pursuant to that scholarship program to students who were pursuing training for the ministry without

violating the Free Exercise Clause of the United States Constitution. *Locke,* 540 U.S. at 721, 725. In doing so, the Supreme Court stated that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19.

[*P73] The decision in *Locke* upheld the prohibition of scholarship aid in unique circumstances not applicable to the present appeal. The specific scholarship at issue in *Locke* was for the study of the ministry, referred to by the Supreme Court as "training for religious professions," and as a "distinct category of instruction." *Id.* at 721. Not all scholarship aid to sectarian schools was prohibited, and the Court noted that "[t]raining someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit." *Id.* The Court noted that in the State of Washington, there is a long history of opposition to the use of taxpayer funds to support the ministry and church leaders, and that the only interest at stake was the State's interest in not funding the training of clergy. *Id.* at 722 & n.5. The Supreme Court stated that it could not "conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect . . . [and that i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

[*P74] Contrary to the training for church ministry that was at issue in *Locke,* for which the provision of scholarship aid the Supreme Court held could be prohibited, section 5204(4) provides tuition aid for primary and secondary education, education that is compulsory for all students in Maine, and in no way constitutes the "training for religious professions" that uniquely limited the Supreme Court's holding in *Locke.*

[*P75] Moreover, in the State of Washington, the prohibition on funding for education for the ministry is grounded in the State's Constitution. Maine has no such constitutional prohibition. Indeed, until the early 1980s and prior to the existence of section 2951(2), which was enacted to comply with the then current understanding of the Establishment Clause of the First Amendment, section 5204 allowed tuition payments to parents who chose to send their children to sectarian schools.[20] Although *Locke* states that there is some "play in the joints" between what is permitted by the Establishment Clause and what is required by the Free Exercise Clause of the United States Constitution, *Locke,* 540 U.S. at 718-19, the overt and broad discrimination in education mandated by section 2951(2) goes far beyond the limited restriction on funding for ministry training sanctioned by the Supreme Court in *Locke,* and constitutes more "play in the joints" than was recognized as legitimate in *Locke.* The prohibition on payment of tuition for sectarian secondary schools is not required by the Establishment Clause of the United States Constitution, and *Locke* should not be read as providing authority for the discriminatory language found in section 2951(2).

[*P76] In my view, section 2951(2) results in a denial of equal protection of the law pursuant to the Maine and Federal Constitutions. *See* U.S. CONST. amend. XIV, § 1; ME. CONST. art. 1, § 6-A. The disparate treatment mandated by section 2951(2) is based on religion, a most fundamental right, and requires that we apply the strict

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[20] *See* Frank Heller, *Lessons from Maine: Education Vouchers for Students Since 1873,* CATO INST. BRIEFING PAPERS (Cato Inst.), Sept. 10, 2001.

scrutiny standard to determine the legitimacy of the State's action. *Bagley,* 1999 ME 60, ¶27, 728 A.2d at 136-37. Strict scrutiny requires that the challenged action of the State be narrowly tailored to achieve a compelling governmental interest. *Id.* The compelling governmental interest that justified the enactment of section 2951(2), namely, that it was required to prevent section 5204(4) from violating the Establishment Clause, is no longer operative, and, accordingly, there is no longer any kind of compelling State interest that justifies the unequal treatment mandated by section 2951(2). Section 2951(2) can no longer withstand strict scrutiny analysis.

[*P77] Further, even if *Locke* is read more broadly than its language would seem to allow, and a rational relationship test is applied to the equal protection interests of the parents, there is no legitimate rationale that should be considered by the Court to justify the discrimination manifested in section 2951(2). The enactment of section 2951(2) was based solely on the conclusion that it was necessary to ensure compliance with the Establishment Clause. That was the *only* reason advanced by the State in *Bagley* to justify the discrimination in section 2951(2). *Bagley,* 1999 ME 60, ¶56, 728 A.2d at 144. The language of section 5204(4) making reference to the First Amendment remains unchanged. Because section 2951(2) is not required by the Establishment Clause, despite the fact that *Bagley* made clear the basis for the enactment of section 2951(2) and the issue on which the State relied in seeking to uphold section 2951(2), the State now advances, and the Court accepts, new, after-the-fact reasons to justify the discriminatory language of section 2951(2). Those reasons should be rejected.

[*P78] I agree that the State is not required to provide tuition aid to parents who wish to send their children to non-public schools. If it does provide such aid, however, it should not be able to exclude private schools that also happen to have a religious affiliation. In my view, that is blatant discrimination that reflects not a *neutrality* toward religion, but rather an animus *against* religion. As was said in *Bagley*, "[i]f the State's justification [for the disparate treatment] is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny." *Id.* ¶32, 728 A.2d at 138. The Establishment Clause is the only rationale that the State should be allowed to advance and that should be considered to justify the disparate treatment reflected in section 2951(2), and it does not.

[*P79] I would vacate the judgment of the Superior Court.

APPENDIX B

KEVIN & JULIA ANDERSON, et al., Plaintiffs v. STATE OF MAINE, DEPARTMENT OF EDUCATION, et al., Defendants.

CIVIL ACTION DOCKET NO. CV-02-480

SUPERIOR COURT OF MAINE, CUMBERLAND COUNTY

2004 Me. Super. LEXIS 206

September 30, 2004, Decided

COUNSEL: For State, Defendants: PAUL STERN AAG, DEPARTMENT OF THE ATTORNEY GENERAL, AUGUSTA, ME.

For McLU: ZACHARY HEIDEN ESQ, PORTLAND, ME.

For Intervenors: JEFFREY THALER ESQ, BERNSTEIN SHUR SAWYER & NELSON, PORTLAND, ME.

For Defendants: JEFFREY EDWARDS ESQ, PRETI FLAHERTY BELIVEAU PACHIOS & HALEY, PORTLAND, ME.

JUDGES: Robert E. Crowley, Justice.

OPINION BY: Robert E. Crowley

OPINION:

ORDER ON PLAINTIFFS', DEFENDANT'S, AND INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

In Maine, "every person within the age limits prescribed by the state statute shall be provided an opportunity to receive the benefit of a free public education." 20-A M.R.S.A. § 2(1). *See also* Me. Const., art. VIII, § 1 ("the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."). The control of the management of the public schools is generally vested in local school administrative units. ("SAUs"). In order to provide public education to students, a school administrative unit may either build its own high school for its students or contract with another SAU or private school that is approved for tuition purposes and that meets basic school approval criteria. *See* 20-A M.R.S.A. §§ 2701 & 5204(3). Alternatively, an SAU that has neither its own school nor a contract with another secondary school may pay tuition to a public school or a qualified private school. 20-A M.R.S.A. § 5204(4).

Prior to 1981, there existed no statutory distinction between secular and religious private schools in the Maine tuitioning statutes. *See* 20 M.R.S. § 1281 (1961). Consequently, parents in towns that lacked their own public schools were able to enroll their children in private religious schools and to receive tuition reimbursements in the same way that were parents who enrolled their children in private secular schools. In 1980, Attorney General Richard Cohen issued an opinion to the Legislature regarding the constitutionality of using State tuition funds to pay for attendance at private religious schools. *See* Op. Me. Att'y Gen. 80-2. In that Opinion, Attorney General Cohen "concluded that the inclusion of religious schools in Maine's tuition program violated the Establishment

Clause." *Bagley v. Raymond School Department*, 1999 ME 60, P5, 728 A.2d 127, 130-31 (citing Op. Me. Att'y Gen. 80-2). Subsequently, in the course of a recodification of the education title of the Maine Code, the Legislature added subsection 2 to the new 20-A M.R.S.A. § 2951, requiring that to be approved to receive tuition payments a school must be "nonsectarian in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2).

Although the legislative debates surrounding the recodification of the education title and the adoption of section 2951(2) make no mention of the impetus behind the new distinction,[1] it is generally understood that it was adopted in response to the Attorney General's Opinion and in an effort to bring Maine's tuition program into compliance with Establishment Clause jurisprudence as it existed at the time. *See Bagley*, 1999 ME 60, P5, 728 A.2d at 130-31.

In 2003, the Maine Legislature rejected a bill – Legislative Document 182 – "An Act to Eliminate Discrimination Against Parents Who Want to Send Their Children to Religious Private Schools" (L.D. 182") – that would have repealed section 2951(2). Excerpts of the debates that took place in the Legislature regarding L.D.

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[1] Indeed, the legislative debates are devoid of any mention of section 2951(2) specifically. Rather, the statute's legislative history includes several statements, made by members of the committee responsible for drafting the bill, that it "does not . . . contain any substantive changes whatsoever." 1 Legis Rec. 229 (1982). *See also* Revision of the Education Laws: Report of the Joint Standing Committee on Education 2 (April 1981).

182[2] include arguments regarding multiple governmental interests furthered by section 2951(2) and its exclusion of religious schools from Maine's tuition program. Those interests include the belief that: "publicly-funded education system works best when the education is one of diversity and assimilation;" that "government officials cannot, and should not, review the religious teachings of religious schools . . . without approving or disapproving of religion," and that "discrimination at religious schools is permissible but the State should not fund that discrimination."

The Plaintiffs

The Plaintiffs in this case are residents of Maine towns[3] that have not built their own public schools and whose SAU's have either contracted with other towns for the provision of public school services[4] or publicly fund their high school students' decisions to attend privately

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[2] In its opposition to Defendants' motions for summary judgment, the Plaintiff objects to these excerpts arguing that they are not relevant under M.R. Evid. 402. As discussed below, the court finds these excerpts to be relevant, admissible and helpful to the extent that they articulate legitimate government interests in excluding private religious schools from Maine's tuition program.

[3] The Anderson, Daniels, Rugan and Vanderwerf Plaintiffs are all residents of Durham; The Jerome Plaintiffs are residents of Raymond; and the Guay Plaintiffs are residents of Minot.

[4] The Town of Minot, along with the town of Mechanic Falls, has contracted with the Town of Poland for secondary school services for at least 90% of students in grades 9-12 from Minot and Mechanic Falls. (JSF P64). The Minot School Policy permits families to apply for approval to attend another high school "based upon education requirements that may not be offered in association with Poland Regional High School." (*Id.* P69).

operated secular schools. All of the Plaintiff parents, as well as their children, are members of either the Catholic,[5] Congregational,[6] or Seventh-day Adventist[7] religions. The Plaintiff children currently attend private sectarian schools, paid for by their parents. None of the Plaintiffs believe that their children must attend private sectarian schools as part of their religion.[8] Instead, the decision to send their children to religious schools is a discretionary and voluntary choice that each of the Plaintiff families have made. All but one of the Plaintiff families explicitly testified that regardless of whether they prevail in this lawsuit, they intend to continue sending their children to private religious schools. Plaintiffs have either specifically requested that their towns pay tuition to St. Dominic's,[9] Pine Tree or Union Springs[10] for their children to attend those schools and were denied by the towns or did not make such a request believing that the towns would deny the request.

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[5] The Guay, Jerome, Rugan, and Vanderwerf Plaintiffs are Catholic.

[6] The Daniels Plaintiffs are Congregationalist.

[7] The Anderson Plaintiffs are Seventh-day Adventist.

[8] Julia Anderson has testified that while her church does not require her to send her children to a Seventh-day Adventist School, nor does she believe that her children must go to Seventh-day Adventist schools as part of her religion, she does believe it violates tenets of her religion to send her children to a secular school because they were teaching things that she believed were detrimental to her children's moral character and spiritual life.

[9] The Guay, Jerome, Rugan, and Vanderwerf Plaintiffs have enrolled their children in St. Dominic's.

[10] The Anderson Plaintiffs have enrolled their children in Pine Tree Academy and Union Springs Academy.

The Schools

St. Dominic's is a private, pervasively sectarian Roman Catholic high school located in Lewiston, Maine operated under the authority and jurisdiction of the Roman Catholic Bishop of Portland. St. Dominic's "reserves the right to establish a priority for admission which will give a preference . . . to those students whose families are registered members of Catholic parishes." Welch Aff. Exh. 7 at I. The school's handbook provides that "participation in the religious classes and spiritual life of the High School is required of all students." *Id.* at IV. Further, any applicant for a teaching position at St. Dominic's must "mirror gospel values in relating to adults and students identified with the school," and "understand and accept the role of the school as a unique pastoral, educational agency of the church." *Id.* at 12.4.

Pine Tree Academy is a pervasively sectarian Seventh-day Adventist School. A child who attends Pine Tree Academy cannot avoid Seventh-day Adventist religious principles in education. The school's handbook states: "Any student in grades K-12 who expresses a desire for a Christian education and meets the criteria for admission is welcome to attend PTA." Krueger Aff. Exh. 1. The high school curriculum requires every student to take and pass a series of four courses on the Bible and Christian life. *Id.* Finally, the application for admission to the school asks whether and when the prospective student was baptized, requests the name and address of church membership of the student, asks for the church affiliation of the parents or guardians, and inquires whether the student has any learning disabilities. *Id.* at Exh. 2.

Union Springs Academy is a pervasively sectarian Seventh-day Adventist School located in Union Springs, New York. The school's handbook states: "students are expected to attend daily and weekend worship services." Jt. Exh. 110. The application for admission asks for church affiliation of the family and each student is required to sign a Student Contract which states: "I understand that Union Springs Academy is a Seventh-day Adventist Christian school and its objective is to help students develop a personal relationship with Jesus Christ while obtaining a high school education. If accepted as a student . . . I agree to refrain from activities that oppose this objective." *Id.* Students at Union Springs are required to take a series of four courses relating to Christ, the Bible and Seventh-day Adventist doctrines. *Id.*

DISCUSSION

This case is the latest iteration of a recurring effort to compel the State of Maine to allow towns to fund private, religious education. The plaintiffs have raised many of the same arguments that similarly situated plaintiffs raised in previous suits seeking a judicial determination that 20-A M.R.S.A. § 2951(2)'s prohibition of public funding for sectarian schools is unconstitutional. *See, e.g. Bagley*, 1999 ME 60, 728 A.2d 127; *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); and *Eulitt v. Maine Department of Education*, 2003 U.S. Dist. LEXIS 13892 (D. Me. 2003) (Kravchuck, Magistrate Judge), *aff'd*, 307 F. Supp. 2d 158 (D. Me. 2004). As the plaintiffs in *Bagley, Strout,* and *Eulitt* did, the Plaintiffs here allege that Maine's statutory preclusion of sectarian schools' eligibility for public tuition funds violates their rights under: (1) the Free Exercise Clause of the First Amendment; (2) the Establishment Clause of the

First Amendment; and (3) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[11]

The impetus behind this latest challenge to the statute is the recent U.S. Supreme Court decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) which, among other things, clarified Establishment Clause jurisprudence and held that, in some situations, states may fund private, religious schools without advancing or inhibiting religion. *Id.* at 643. Based upon *Zelman*, Plaintiffs argue here that previous decisions of the Law Court (in *Bagley*) and the First Circuit Court of Appeals (in *Strout*), which held that a tuition program that specifically excludes religious schools does not violate the Establishment Clause, are no longer good law and, as a result, Maine's statute should now be held unconstitutional. In addition, the Plaintiffs are seeking reimbursement from the State and their town school districts for tuition for the 2002-03 and 2003-04 school years as well as injunctive and declaratory relief ordering the State and the towns not to discriminate against them on the basis of religion in connection with future requests for tuition payments on their behalf.[12]

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[11] Plaintiffs' First Amended Complaint also alleged violations of the Speech Clause of the First Amendment. In their Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("PMSJ"), however, plaintiffs expressed their decision not to pursue that claim "in light of the U.S. Supreme Court's treatment of a similar claim in *Locke v. Davey*, 124 S. Ct. 1307, 1313 n.3 (2004)." PMSJ at 1, n.1

[12] The individual towns of Raymond, Minot and Durham as well as their respective school districts were originally named as defendants in this suit. In an Order dated May 14, 2003, however, this court found that because the town school districts were applying state law in

(Continued on following page)

Motions for Summary Judgment

Standard of Review

Summary judgment is proper where there is no genuine issue of material fact. *Rogers v. Jackson*, 2002 ME 140, P5, 804 A.2d 379, 380. In considering a motion for summary judgment, the court must "consider the evidence and reasonable inferences that may be drawn from the evidence in the light most favorable," to the non-moving party "in order to determine if the parties' statements of material facts and referenced record evidence reveal a genuine issue of material fact." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, P2, 845 A.2d 1178, 1179 (citing *Rogers*, 2002 ME 140, P5, 804 A.2d at 380). A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial. *Id.* (citing *Burdzel v. Sobus*, 2000 ME 84, P6, 750 A.2d 573, 575). At oral argument on the various motions for summary judgment currently before the court, each of the parties agreed that there exist no genuine issues of material fact and that summary judgment is appropriate in this case. Given, therefore, that there are no disputes over the relevant facts, the court will address each of the Plaintiffs' claims individually and grant summary judgment as to each claim.

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denying Plaintiffs tuition payments for their children's schooling, they could not be held liable under 42 U.S.C. § 1983. Consequently, this court granted the Towns' motions to dismiss pursuant to M.R. Civ. P. 12(b)(6). *See Anderson v. Town of Durham*, PORCV-02-480 (Me. Super. Ct., Cumb. Cty., May 14, 2003) (Crowley, J.).

Free Exercise

In extending their argument that Maine's statute effectively "excludes the option of choosing sectarian schools," and thus violates the Free Exercise Clause, Plaintiffs readily acknowledge that the operative law and relevant facts have not changed substantially since *Bagley* with respect to their Free Exercise Claim.

Plaintiffs' Free Exercise Clause claim fails simply by virtue of the fact that the law in this area is well settled and has remained unchanged since *Bagley* was decided on identical facts, notwithstanding the *Zelman* decision. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." (*Hernanadez v. Commissioner*, 490 U.S. 680, 699 (1989)). In *Bagley,* the Law Court "could not find that any substantial burden has been imposed on the free exercise of [Plaintiffs' religious] beliefs," by Maine's tuitioning law. *Bagley*, 1999 ME 60, P18, 728 A.2d at 134.

Instead, the Law Court found that the law "merely operates so as to make the practice of [the individual's] religious beliefs more expensive," which is not enough of an inhibition to violate the Free Exercise Clause. *Id.* (quoting *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996)). According to the court, the law did "not prevent the parents from sending their sons to [a sectarian school],"[13] it

[13] Although this reasoning similarly applies to the instant case, it is worth noting, again, that none of the Plaintiffs here have asserted

(Continued on following page)

simply made their decision to do so more expensive than it might have otherwise been. Indeed, "while [the parents] will not receive tuition assistance if they choose to [send their children to sectarian schools], they are no more impaired in their efforts to seek a religious education for their sons than are parents of children in school districts that provide only a free nonreligious education in public schools." *Bagley*, 1999 ME 60, P18, 728 A.2d at 134.

Consistent with Free Exercise jurisprudence as it existed at the time and as it exists now, the Law Court in *Bagley* held that section 2951(2) does not place a substantial burden on the free exercise of religion and that "the exclusion of religious schools from the tuition program does not violate the Free Exercise Clause of the First Amendment." *Id.* P20, 728 A.2d at 134. This reasoning was echoed by the Court of Appeals for the First Circuit in *Strout,* where that court similarly found that the same Maine statute "does not prevent attendance at religious schools," nor does it burden the free exercise of religion given that "no parent makes the claim that attendance at a religious school is a central tenet or practice of their faith." *Id.* Finally, the U.S. Supreme Court in *Locke v. Davey*, 124 S. Ct. 1307 (2004) recently reversed a judgment of the Ninth Circuit that held that a similar prohibition in Washington State violated the Free Exercise Clause.

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that sending their children to religious schools amounts to "practicing" religion or comprises a central tenet of their respective faiths.

The Establishment Clause

As with their argument regarding the Free Exercise Clause, the plaintiffs in this case readily acknowledge that little has changed in either the facts or the applicable law since *Bagley* to justify a different result with respect to their Establishment Clause claim. Therefore, Plaintiffs have raised it primarily to preserve the issue for appeal. To the extent that they do articulate the basis for their Establishment Clause claim, however, Plaintiffs' argue that Maine's statute effectively creates a regime of non-religion rather than a regime of religious neutrality, and therefore violates the Establishment Clause. The Defendants argue again that, as with the Free Exercise argument, Establishment Clause jurisprudence has not changed since *Bagley* in any way that would compel a different outcome in this case.

In *Bagley,* the Law Court explained that "the Establishment Clause prohibits government from supporting or advancing religion and from forcing religion, even in subtle ways, on those who choose not to accept it." *Bagley*, 1999 ME 60, P22, 728 A.2d at 135. That Clause has no role, however, "in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." *Id.* P22, 728 A.2d at 136. Accordingly, the Law Court found "no support for the proposition that the Establishment Clause prevents a state from refusing to fund religious schools." *Id.*

The Law Court's interpretation of the Establishment Clause and its holding in *Bagley* are consistent with the jurisprudence of the Court of Appeals for the First Circuit and of the U.S. Supreme Court. In *Strout,* the Court of

Appeals rejected the argument that Maine's statute demonstrates an impermissible hostility to religion. *Strout*, 178 F.3d at 64. Indeed, that court was "at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery." *Id.* According to the court, "the Establishment Clause forbids the making of a law respecting the establishment of any religion. There is no relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure" state funding. *Id.*

Finally, in *Locke,* the U.S. Supreme Court held that the State of Washington's decision not to fund religious education was not sufficiently hostile to religion to violate the Establishment Clause. *Locke*, 124 S. Ct. at 1315 n.10. Notwithstanding the *Zelman* decision, which held that states *may* fund private religious education, there is no binding authority that stands for the proposition that a state *must* fund private religious education in order to avoid running afoul of the Establishment Clause. *See, Eulitt v. Maine Department of Education*, 2003 U.S. Dist. LEXIS 13892, ** 10-11 (D. Me. 2003) (Kravchuck, Magistrate Judge).

The Equal Protection Clause

Standing

As an initial matter, the State asserts that the Plaintiffs lack standing to pursue an equal protection claim. The State contends that if any disparate treatment has resulted from Maine's statute, it is the religious schools themselves that have been discriminated *against and not the parents. Therefore, according to the State, any claims arising under* the Equal Protection Clause are those for

the schools to make, not the parents. Because the parents have not demonstrated that the schools are unable to assert their own rights, the State argues that the plaintiffs lack standing to vindicate the schools' rights. Plaintiffs maintain that because it is the students and their families who are the primary beneficiaries under Maine's tuitioning system and because the schools are merely recipients of indirect, incidental benefits, it is the plaintiffs who have been most affected by the tuitioning system and who have standing to bring an equal protection claim.

Although logistically speaking there is a difference between Maine's program and the Ohio program at issue in *Zelman*,[14] Plaintiffs are correct that it is the choices of parents that are being funded and that are at issue here rather than the interests of the religious schools. Despite the fact that Maine's tuitioning practices, as they relate to funding tuition at private secular schools, involve direct payments from the SAU's to the private schools, this fact does not necessitate a conclusion that the plaintiffs lack standing. While it may be true that the schools are in a better position to argue disparate treatment, it is equally true that any tuition monies paid by a school district are contingent on the individual choice of parents to enroll

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[14] The Ohio statute, in relevant part, reads:

> Each scholarship to be used for payments to a registered private school is payable to the parents of the student entitled to the scholarship. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

Ohio Rev. Code Ann. § 3313.979 (Anderson 1999 and Supp. 2003). Maine's program, however, provides for payments to be made directly to either a public or a private school. *See* 20-A M.R.S.A. §§ 5204 & 5810.

their children in a particular school. The plaintiffs are essentially precluded from receiving a government benefit based on their having made a religiously motivated decision. Plaintiffs here are primarily claiming constitutional protection of the educational decisions they have made on behalf of their children and they therefore have standing. *Cf. Bagley*, 1999 ME 60, PP25-26, 728 A.2d at 136 ("We will assess the parents' Equal Protection argument assuming *arguendo* that the parents' lack of opportunity to have the State pay the tuition for the children to attend a private religious school results in their own disparate treatment on the basis of their religion.") *Id.* P26, 728 A.2d at 136.

Analysis

The plaintiffs' claim that Maine's tuitioning law violates the Equal Protection Clause is the claim upon which they have focused most of their efforts. The plaintiffs argue, as did the plaintiffs in *Bagley*, that section 2951(2) violates the Equal Protection clause by excluding sectarian schools from the category of schools to which parents in tuitioning towns can send their children using public funds. In support of their argument that Maine's statute is unconstitutional, the plaintiffs point to dicta in the *Bagley* opinion in which the Law Court noted that "if the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny," and the statute "must be struck down because the State offers no other reason for its existence." *Bagley*, 1999 ME 60, PP32-33, 728 A.2d at 138. Based on this statement in *Bagley* and the subsequent decision rendered by the U.S. Supreme Court in *Zelman* that a state may fund private religious schools

without running afoul of the Establishment Clause, the plaintiffs contend that the State's justification for the Maine statute's exclusion fails and section 2951(2) must now be struck down as unconstitutional.

Defendants, on the other hand, contend that Plaintiffs have failed to prove the disparate treatment necessary to trigger an Equal Protection analysis. They argue that because Plaintiffs can obtain a free secular education just as anyone in the State can there is no disparate treatment. This argument must fail given that the *Bagley* court found, on similar facts, that the statute does indeed create a distinction based on religion. 1999 ME 60, PP29-30, 728 A.2d at 137. In that case, the Law Court found that section 2951(2) "explicitly excludes only those private schools with religious affiliations." As such, the statute effectuates an "obvious disparate treatment of religious schools," under the statute, thereby triggering Equal Protection analysis. *Id.* The statute similarly effectuates disparate treatment of parents' educational choices in towns that do not operate their own school systems.

Under traditional Equal Protection analysis, distinctions based on suspect classifications such as race and religion are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). Notwithstanding this precept, however, Defendants argue that rational basis is the proper standard under which section 2951(2) should be scrutinized. Defendants first point to footnote three in the *Locke* decision in which the U.S. Supreme Court noted that where a statute has been found to be in accordance with the Free Exercise Clause, rational basis is the appropriate level of scrutiny for Equal Protection purposes. *See,*

Locke v. Davey, 124 S. Ct. 1307, 1313 n. 3 (2004). In addition, Defendants argue that public education is a governmental function so vital that even if the government, in carrying out that function, impacts a suspect classification, state action is subject only to rational basis scrutiny. State Def. Mot. Summ. J. at 25-26 (citing *Blount v. Dep't of Education & Cultural Services*, 551 A.2d 1377, 1381-82 (Me. 1988); and *Ambach v. Norwick*, 441 U.S. 68 (1979)).

Because it is not necessary, for the reasons stated *infra,* for the court to decide which level of scrutiny is proper in this case, the court will not address Defendants' arguments in favor of rational basis at length. Instead, the court finds that regardless of the proper level of scrutiny, and despite the fact that *Zelman* rendered faulty the justifications for the statute offered in *Bagley, Zelman* has not rendered the *Bagley* decision inapt nor has it rendered section 2951(2) unconstitutional.

In both *Bagley* and *Strout,* the State argued and those Maine courts found that the statute was adopted in an effort to bring Maine's tuition program into compliance with the Establishment Clause. Unlike *Bagley,* however, the State in this case has offered several reasons for the distinction created by the statute. While it may be true that, post *Zelman,* the State's argument that the statute is constitutional would fail if it offered no other reason for the statute's existence than compliance with the Establishment Clause, the State in this case has offered several other justifications for the statute, at least one of which is compelling enough to withstand both rational and strict scrutiny.

The plaintiffs argue that the justifications for the statute offered by the State in this case, stemming as they do from the legislative debates in 2003 over L.D. 182, cannot be considered by the court because there is no indication that they were contemplated by the Legislature when it originally enacted section 2951(2). Citing *Weinberger v. Wiesenfelder*, 420 U.S. 636, 648 n.16 (1975), Plaintiffs contend that when the actual justification for a statute is known, hypothetical justifications that were not considered by the legislature are not to be considered by the courts. Finally, plaintiffs argue that the debates surrounding L.D. 182, which took place twenty-two years after section 2951(2) was enacted, are not reliable sources from which to glean the legislative intent which led to the original enactment of the statute and should therefore not be considered by this court.

Although the court recognizes that "unsuccessful attempts at legislation are [often] not the best of guides to legislative intent," there are in fact circumstances where legislative "nonaction is significant" and may be considered by a court seeking to discern intent. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). In situations where, as here, the Legislature has not simply declined to act or passively acquiesced in shifts in statutory application but has, instead, taken affirmative steps to reaffirm a statute's function and to articulate informed, purposeful reasons for doing so, a court should not discount such clear indicators of legislative intent. *See id.* Further, while it may be true that courts, when faced with an explicit and singular justification for the statute, are appropriately hesitant to afford much deference to

hypothetical justifications or justifications offered after the original enactment,[15] that is not the situation here. Nowhere in the legislative history of section 2951(2) does it say that "compliance with the Establishment Clause" was the sole reason for the distinction between secular and private schools contained in the recodification of the education laws. Rather, compliance with the Establishment Clause and with the Attorney General's 1980 Opinion was the justification most readily suggested by the sequence of events leading up to the drafting of section 2951(2) and the sole justification presented by the State in defense of the statute when it was challenged in *Bagley* and its counterparts. Further, neither those cases, nor the 1981 and 2003 legislative debates, definitively established a singular, exclusive legislative intent. Given, therefore, that in 2003, when faced with the U.S. Supreme Court decision in *Zelman*, and the resulting challenge to Maine's statute, the Legislature reexamined section 2951(2), engaged in an informed debate over its continued necessity and validity, and ultimately determined that the statute accurately reflected the will and the interests of the people of this State in a manner consistent with the Constitution, those justifications are relevant and important and this court will consider them. *See Bob Jones University v. United States*, 461 U.S. at 601.

As justification for excluding private religious schools from Maine's tuition program, the State advances the following rationales:

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[15] *See Weinberger v. Wiesenfelder*, 420 U.S. 636, 648 n.16 (1975) (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973).

> (1) A publicly funded education system works best when that education is one of diversity and assimilation, and not a separate and sectarian one.
>
> (2) Public funds should pay for religiously neutral rather than a religious education.
>
> (3) The State cannot reasonably oversee all aspects of a sectarian school's curriculum because to do so would result in religious entanglements.
>
> (4) Religious schools can, and reserve the right to, discriminate in favor of their own religion, and this state should not fund discrimination.
>
> (5) There exists no exigency as in *Zelman* that would reasonably require the State to depend upon sectarian schools to help provide all Maine children with a free public education.

Def. Mot. Summ. J at 28-29 (quoting *Eulitt*, 2003 U.S. Dist. LEXIS 13892, at **8-9).

The first rationale given by the State in this case is diversity in public education. The argument that the sectarian schools in which the plaintiffs have enrolled their children practice some measure of discrimination based upon religion and that that discrimination results in less diverse student bodies and teaching curricula than those seen in Maine's public schools is borne out by the facts in this case. *See supra* at 4-5. The private religious schools unequivocally espouse sectarian principles in their teaching methods and in their admission policies by requiring students to take Bible study courses and by preferring members of their respective religions for admission. *Id.*

These practices have facilitated the schools' enrollment of students with largely homogeneous religious beliefs.[16] While it is permissible for religious schools to enroll students who possess similar, if not identical religious beliefs, the Maine Legislature, operating under its mandate to represent the people of Maine, has indicated that a more diverse student community and curriculum is preferable. In rejecting L.D. 182 in 2003, the legislature rejected an opportunity to change the tuition program and provide public funding to private sectarian schools that discriminate on the basis of religion. As noted by Magistrate Judge Kravchuck in her recommendation in *Eulitt,* school funding issues "are best left to legislative determination, so long as they meet constitutional requirements." *Eulitt v. Maine Department of Education*, 2003 U.S. Dist. LEXIS 13892, *8 (D. Me. 2003).

The argument that encouraging and protecting diversity is a compelling government interest, capable of withstanding strict scrutiny, is well established in Equal Protection jurisprudence. The U.S. Supreme Court recently reconfirmed that student body diversity is a compelling state interest and the benefits of diversity are substantial. *Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003); and *Gratz v. Bollinger*, 539 U.S. 244 (2003)). Because the court can point to recent and authoritative legal precedent in making a determination that at least one of the State's justifications for section 2951(2) withstands strict scrutiny, it is unnecessary for the court to

[16] The student body at St. Dominic's is approximately 75 percent Catholic while the student body at Pine Tree Academy is approximately 75-85 percent Seventh-day Adventist. Joint Stipulation of Facts at PP107 & 114.

decide whether the validity of the justification offered in *Bagley* has survived *Zelman*. Rather, it is enough for this court to find, as it does, that the justification for 2951(2)'s religiously-based distinction is compelling and that it withstands strict scrutiny. As such, Maine's tuition program is constitutionally sound.[17]

The entry is

Plaintiffs' Motion for Summary Judgment is DENIED.

Defendants' Motions for Summary Judgment are GRANTED.

Dated at Portland, Maine this 30th day of September, 2004

Robert E. Crowley

Justice, Superior Court

[17] The court notes that it has not explicitly addressed or decided whether the statute meets the "narrowly tailored" prong of the strict scrutiny analysis should strict scrutiny apply. This is largely a function of the fact that the parties have not presented arguments on the issue. In addition, and notwithstanding *Zelman*, "while it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children," the court is not convinced that it could do so "without addressing significant problems of entanglement," and while still advancing the objectives of the Legislature and the people of this state. *Bagley*, 1999 ME 127, P71, 728 A.2d at 147.

APPENDIX C

Maine Const., Art. VIII § 1. Legislature shall require towns to support public schools; duty of Legislature

Section 1. A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the State; provided, that no donation, grant or endowment shall at any time be made by the Legislature to any literary institution now established, or which may hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have the right to grant any further powers to alter, limit or restrain any of the powers vested in any such literary institution, as shall be judged necessary to promote the best interests thereof.

APPENDIX D

20-A M.R.S. § 2951 (2005)

§ 2951. Approval for tuition purposes

A private school may be approved for the receipt of public funds for tuition purposes only if it:

1. BASIC APPROVAL. Meets the requirements for basic school approval under subchapter I;

2. NONSECTARIAN. Is a nonsectarian school in accordance with the *First Amendment of the United States Constitution*;

3. INCORPORATED. Is incorporated under the laws of the State of Maine or of the United States;

4. REPEALED. Laws 1983, c. 859, § A, 8.

5. ADDITIONAL REQUIREMENTS. Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. STUDENT ASSESSMENT. Any school that enrolls 60% or more publicly funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of students; and

7. RELEASE OF STUDENT RECORDS. Upon the request of a school unit, release copies of all student records for students transferring from the private school to the school unit.

20-A M.R.S.A. § 5204(4) Secondary students right to attend school in another administrative unit

The following provisions govern the right of secondary students to attend school in another school administrative unit other than the one in which they are resident.

* * *

4. NO SECONDARY SCHOOL. Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in chapter 219.

APPENDIX E

[LOGO]

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006
[Names And Addresses Omitted In Printing]

July 12, 2002

J. Duke Albanese, Commissioner
Department of Education
23 State House Station
Augusta, Maine 04333-0023

Dear Commissioner Albanese:

You have inquired regarding the continuing vitality of 20-A M.R.S.A. § 2951(2) in light of the decision of the Supreme Court of the United States on June 27, 2002, in *Zelman v. Simmons-Harris,* No. 00-1751 (U.S. June 27, 2002). Section 2951(2) excludes sectarian schools from participation in Maine's state-wide, publicly-funded education plan. In particular, that provision renders ineligible sectarian schools from receipt of public tuition payments. Maine's plan has been upheld recently by both the U.S. Court of Appeals for the First Circuit and Maine's Law Court. *Strout v. Albanese,* 178 F.3d 57 (1st Cir.), *cert. denied* 528 U.S. 931 (1999); *Bagley v. Raymond School Department,* 1999 ME 60, 728 A.2d 127, *cert. denied* 528 U.S. 947 (1999)

The Supreme Court in *Zelman* upheld an Ohio education plan which allowed parents in the failed Cleveland public school system to choose between a variety of options for education of their children, including the payment of

public funds by means of "vouchers" to sectarian schools. As is obvious from both the decision and commentary which has followed, *Zelman* represents a further evolution in Establishment Clause jurisprudence. That being said, *Zelman* dealt with a statute which *allowed a* state to use vouchers. The issue presented by any challenge to Maine's law is fundamentally different: whether Maine is *required* to fund sectarian education. That issue has not been decided by the Supreme Court. There are a number of other significant differences between the Ohio public education plan before the Court in *Zelman* and that of Maine including, *inter alia*, the structure of the school system, the structure of the tuition program, the options available and the level of payments.

Since *Zelman* did not address in particular the issue presented by Maine's law, until the Legislature or a court mandates otherwise, it remains the responsibility of the Department of Education and school administrative units across the State to continue to abide by section 2951(2).

If we can provide further assistance, please call on us.

Sincerely,

/s/ G. Steven Rowe
G. Steven Rowe
Attorney General

APPENDIX F

[LOGO]

STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

[Names Omitted In Printing]

January 7, 1980

Honorable Howard M. Trotzky
Maine State Senate
State House
Augusta, Maine 04333

Dear Senator Trotzky:

This will respond to your request for an opinion on the following question:

> "Does L.D. 691, Chapter 431, Public Law 1979, violate the First Amendment of the U.S. Constitution inasmuch as it allows individuals in school administrative districts to attend privately operated religious schools at public expense?"

Your question raises a broader issue, namely, whether public funds may be used to pay the tuition of children attending religiously operated elementary and secondary schools. In order to properly respond to your question, it is necessary to set out the pertinent statutory provisions in some detail.

The Statutory Framework

At the present time there are several statutes which authorize school officials, in appropriate circumstances, to pay the tuition of students who attend privately operated elementary and secondary schools. Section 1 of Chapter 431 of the Public Laws of 1979 enacted a new section 213-A to Title 20 of the Maine Revised Statutes which mandates that each school administrative district maintain both an elementary and a secondary school for its pupils. 20 M.R.S.A. §213-A (2)(D) (1965-1979 Supp.) provides, however, that

> " . . . a district may meet the requirement of providing a secondary school facility by contracting . . . with a private academy for all or part of its pupils for a term of from 2 years to 10 years."

20 M.R.S.A. §912 (1965-1979 Supp.) authorizes each school administrative unit to contract with another administrative unit for elementary school privileges. In the event that an administrative unit does not maintain an elementary school and does not contract for elementary school privileges, it "may pay tuition for any student who resides with a parent or legal guardian in that administrative unit and who attends an approved elementary school." 20 M.R.S.A. §912 (1965 – 1979 Supp.).

Section 1289 of Title 20, as amended by P.L. 1979, c. 431, §4, permits any administrative unit which does not maintain a secondary school to authorize its local school committee to enter into contracts with the trustees of an approved private academy for secular educational services. Any contract entered into pursuant to 20 M.R.S.A. §1289 may run from one to five years. Section 1289 further provides that in those instances where an administrative unit

has entered into a contract with a private academy, a joint committee may be established consisting of "a mutually agreed upon number of members of the school committee or board of directors of each contracting administrative unit chosen from their own membership and an equal number of trustees of the academy." The responsibilities and powers of the joint committee are set out in 20 M.R.S.A. §1289 (1965-1979 Supp.) and include the authority to select and employ the teachers at the academy, to fix their salaries, to arrange the course of study and "to supervise the instruction and to formulate and enforce proper regulations pertaining to other educational activities of the school." Finally, with respect to the financial arrangements pertaining to a contract made pursuant to 20 M.R.S.A. §1289, the tuition liability of the contracting administrative unit is the same as if the unit maintained an approved secondary school.

In the event that an administrative unit does not maintain an approved secondary school and does not contract for secondary school privileges, a student who resides within the unit "may attend any approved secondary school to which he may gain admission. 20 M.R.S.A. §1291 (1965-1979 Supp.) *as amended* by P.L. 1979, c. 431, §5. Additionally, 20 M.R.S.A. §1291 permits a student to attend "some other approved secondary school to which he may gain admission for the purpose of studying an occupational course, a mathematics or science course or a foreign language course, where the secondary school within his administrative unit does not offer a sufficient number of those courses.[1]

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[1] 20 M.R.S.A. §1291 (1965-1979 Supp). provides in pertinent part:

"Any youth whose parent or legal guardian maintains a home for his family in an administrative unit that maintains, or contracts for school privileges in, an approved secondary school which offers less

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Finally, 20 M.R.S.A. §1454 provides that "[a]ny youth whose parent or legal guardian maintains a home for his family in the unorganized territory of this State and who may be judged by the commissioner qualified to enter an approved secondary school may attend any such school in the State to which he may gain entrance. . . ."

To summarize the statutory provisions in question, 20 M.R.S.A. §213-A (1955-1979 Supp.) permits a school administrative district, which does not maintain a secondary school facility, to contract with a private academy to provide secondary school privileges for its pupils. 20 M.R.S.A. §912 (1965-1979 Supp.) authorizes a school administrative unit, which does not maintain an approved elementary school and does not contract with another unit for such services, to pay a student's tuition for attendance at "an approved elementary school." 20 M.R.S.A. §1289 (1965-1979 Supp.) authorizes a school administrative unit, which does not maintain an approved secondary school, to contract with a private academy to provide for the schooling of all or some of its pupils. 20 M.R.S.A. §1291 (1965-1979

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than 2 approved occupational courses of study, and who has met the qualifications for admission to the high school in his town, may elect to attend some other approved secondary school to which he may gain admission for the purpose of studying an occupational course not offered or contracted for by the administrative unit of his legal residence. Any youth whose, parent or legal guardian maintains a home for his family in an administrative unit that maintains, or contracts for school privileges in, an approved secondary school, and who has met the qualifications for admission to the high school in his unit, may elect to attend some other approved secondary school in the State to which he may gain admission for the purpose of studying or of completing at least a 2-year course in mathematics or science when such courses are not offered or contracted for by the administrative unit of his legal residence or a foreign language when the unit where he resides offers less than 2 approved foreign language courses, . . ."

Supp.) permits a student to attend any approved secondary school to which he may gain admission in the event that his school administrative unit does not support, maintain or contract for secondary schooling for its pupils. Additionally, 20 M.R.S.A. §1291 permits a student, in appropriate circumstances, to attend an approved secondary school to which he may gain admission for the purpose of studying an occupational course, a mathematics or science course or a foreign language course. Finally, 20 M.R.S.A. §1454 (1965-1979 Supp.) permits, in certain circumstances, a student from the unorganized territory to attend an approved secondary school, to which he may gain admission, at State expense.

Before addressing your specific question regarding the, constitutional issue, it is necessary to determine whether the statutory provisions referred to above apply to religiously operated elementary and secondary schools or whether the statutory authority of school administrative districts and units to enter into contracts with and pay the tuition of students at non-public schools is limited to private non-religious elementary and secondary schools.

It is a well-established principle that the courts will avoid addressing questions raising constitutional issues unless it is impossible to do so. *See, e.g., Johnson v. Maine Wetlands Control Board*, Me., 250 A.2d 825, 827 (1969); *State v. Good*, Me., 308 A.2d 576, 579 (1973); *Morris v. Goss*, 147 Me. 87, 93, 83 A.2d 556 (1951). While the judiciary has both the duty and the power to invalidate unconstitutional legislation, *State v. Butler*, 105 Me. 91, 73 A.560 (1909), it has an equally important responsibility to exercise that power with caution and "only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute. . . ." *Crommett v. City of*

Portland, 150 Me. 217, 231, 107 A.2d 841 (1954) *quoting State v. Vahlsing*, 147 Me. 417, 430, 88 A.2d 144 (1952). As stated by former Chief Justice Dufresne, "[t]he cardinal principle of statutory construction is to save, not to destroy." *State v. Davenport*, Me., 326 A.2d 1, 6 (1974).

With respect to any legislative enactment, there is a strong presumption of constitutionality. *State v. S.S. Kresge, Inc.*, Me., 364 A.2d 868, 872 (1976). In construing legislation, the duty of the court is to determine whether the provisions of the statute "are susceptible of a reasonable interpretation which would satisfy constitutional requirements." *Portland Pipe Line Corp. v. Environmental Improvement Commission*, Me., 307 A.2d 1, 15 (1973), *app. dismissed*, 414 U.S. 1035 (1973). If at all possible a statute should be construed, in a reasonable manner, so as to, avoid rendering it unconstitutional. *State v. Fitanides*, Me., 373 A.2d 915, 920-21 (1977). Where a statute is reasonably susceptible of two interpretations, the court is bound to adopt that interpretation which sustains the statute's constitutionality. *See Portland Pipe Line Corp. v. Environment Improvement Commission, supra; In re Stubbs*, 141 Me. 143, 147, 39 A.2d 853 (1944).

With respect to sections 213-A, 912, 1289, 1291 and 1454 of Title 20, the statutes are all silent as to whether school administrative units and districts are authorized to pay the tuition of students attending religiously operated elementary and secondary schools. Each statute in question authorizes, in appropriate cases, either a school administrative unit or district to enter into contracts with and pay the tuition for students at privately operated elementary and secondary schools. One interpretation of these statutes is that administrative units and districts may contract with any private elementary or secondary

school, including religiously operated ones. On the other hand, an equally reasonable interpretation of these statutory provisions is that the authority of administrative units and districts to enter into such contracts is limited to private, non-sectarian elementary and secondary schools.

In view of the doctrine that statutes should be construed, if reasonably possible, so as to avoid rendering them unconstitutional, it is now necessary to consider whether the practice of using public funds to pay tuition for students attending religiously operated elementary and secondary schools is constitutionally permissible.[2]

The Establishment Clause

The First Amendment to the United States Constitution[3] provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Article I, §3 of the Maine Constitution contains a similar prohibition.[4]

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[2] It is our understanding that as of October 1, 1979, 46 pupils were attending religiously operated elementary schools and 289 pupils were attending religiously operated secondary schools at public expense pursuant to 20 M.R.S.A. §§213-A, 912, 1289, 1291 or 1454 (1965-1979 Supp.).

[3] The provisions of the First Amendment have been made binding on the states through the Fourteenth Amendment. *See Murdock v. Pennsylvania*, 319 U.S. 106, (1943).

[4] Article I, §3, Me. Const., provides:

> "All men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences, and

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Any analysis of the First Amendment's "Establishment Clause" and its interrelationship with state attempts to provide public aid, either directly or indirectly, to religiously operated schools, must necessarily begin with the United States Supreme Court decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the Court upheld a New Jersey statute authorizing reimbursement to parents for the costs of transporting their children to school. The statute also permitted reimbursement for transportation expenses to parents whose children attended parochial schools. In arriving at its decision, the Court recognized the inherent tension between the "Establishment Clause" and the "Free Exercise Clause" of the First Amendment. As stated by the Court:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and

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no one shall be hurt, molested or restrained, in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; – and all persons demeaning themselves peaceably, as goodmembers of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."

The Maine Law Court has held that the prohibitions in Article I, §3 are "no more stringent" than those embodied in the First and Fourteenth Amendments to the United States Constitution. *Squires v. City of Augusta*, 155 Me. 141, 164, 153 A.2d 80, 88 (1959).

> faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."

Id. at 16.

Acknowledging that the "establishment clause" was intended to erect "'A wall of separation between church and State,'" the Court concluded that providing bus transportation to *all* children, including those attending religious schools, did not offend any constitutional principle embodied in the First Amendment. *Id.* at 16 *quoting Reynolds v. United States*, 98 U.S. 145, 164. In essence, the Court concluded that providing transportation to all school children did not have either the purpose or effect of promoting or establishing religion.[5]

In *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) the Supreme Court attempted to formulate a general rule regarding establishment clause cases.[6] The Court stated:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose

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[5] The constitutionality of using public money to provide transportation to children attending religious schools was recently reaffirmed in *Cromwell Property Owners Association v. Toffolon*, ___F.Supp. ___, (D.Conn., Docket No.Civil H-78-475, Filed August 31, 1979).

[6] *Abington School District v. Schempp, supra* involved Bible reading in public schools. *See also Engel v. Vitale*, 370 U.S. [. . .]

> and a primary effect that neither advances nor inhibits religion."

Applying the test announced in *Schempp*, the Court in *Board of Education v. Allen*, 392 U.S. 238 (1967) upheld a New York statute authorizing the loan of approved secular textbooks to all school children, including those attending parochial schools. While the Court recognized that textbooks are significantly different from school buses, the Court also noted that "each book loaned must be approved by the public school authorities; only secular books may receive approval." 392 U.S. at 244-45.

In its landmark decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter referred to as *Lemon I*), the United States Supreme Court added a third and possibly a fourth criterion to the "purpose and effect" test it had adopted and followed in *Schempp* and *Allen*. In *Lemon I*, the Court held that in order for a statute to survive a challenge that it is unconstitutional because it authorizes state aid to religiously affiliated schools, not only must it have a secular legislative purpose and a primary or principal effect which neither advances nor inhibits religion, it must also not foster an excessive governmental entanglement with religion. Additionally, the Court suggested that issues involving the use of public money to aid religious schools carry the potential for political divisiveness in local communities. This danger of political divisiveness, the Court added, is at odds with the fundamental principle that church and State remain separate.

The analysis formulated in *Lemon I* has been utilized by the Court in all of the subsequent cases raising establishment clause challenges. In evaluating a challenged statute, it should be emphasized that the First and Fourteenth

Amendments prohibit laws "'respecting an establishment of religion' even though its consequence is not to promote a 'state religion.'" *Committee For Public Education v. Nyquist*, 413 U.S. 756, 771 (1972). On the other hand, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone constitutionally invalid." *Id.*

An examination of each of the tests articulated in *Lemon I* follows.

The "Purpose" Test

The "purpose" test enunciated by the United States Supreme Court is perhaps the easiest to apply. Pursuant to this standard, the Court attempts to ascertain the purpose which the legislative enactment was designed to achieve. In most cases involving state aid to religious schools, it is clear, one way or the other, what purpose the statute was intended to serve. In the most recent cases the Court has had no need to use the "purpose" test since it has been clear that a particular statute had a secular purpose, i.e., providing for the education of all school children. However, in some relatively early decisions the Court did strike down state statutes because their purposes were to promote religious activity. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1969) (statute prohibiting the teaching in public schools of the theory of evolution); *Engle v. Vitale*, 370 U.S. 421 (1962) (statute requiring prayer reading in public schools); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (statute requiring Bible reading in public schools); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (statute authorizing "release time" from public education for religious instruction in

public school buildings). *Compare Zorach v. Clauson*, 343 U.S. 306 (1952) in which the Court upheld the constitutionality of a statute authorizing "release time" from public education for religious instruction off public school premises.

It is fair to say that with respect to cases involving public aid, in varying forms, to religious educational institutions, the Court has rarely used the "purpose" test to invalidate a state statute.

The "Primary or Principal Effect" Test

The "primary effect" test formulated by the United States Supreme Court to evaluate statutes claimed to be violative of the Establishment Clause is, perhaps, the most difficult test to understand and apply. In many cases, its contours overlap with those of the "entanglement" test. Nevertheless, it is fair to say that those cases which have discussed and applied the "primary effect" test have emphasized a common element. That element is that the educational institutions receiving public aid were pervasively religious, such that it would be impossible to identify public aid as being used for purely secular purposes. The pervasively religious atmosphere at such institutions has led the Court to conclude that public aid for purely secular functions cannot be distinguished from the sectarian function performed by the religious institution and therefore has a primary effect of aiding and/or promoting that religious atmosphere. A few examples may clarify the "primary effect" rationale.

In *Hunt v. McNair*, 413 U.S. 734 (1973) the Court considered a South Carolina statute which was designed to assist higher education institutions in constructing,

financing and re-financing building projects through revenue bonds. The law was designed to benefit all institutions of higher education, including those operated by religious groups. The advantage of the statute was that the college or university would borrow money at low interest and would not have to pay income tax on that interest. The law was challenged on First Amendment grounds when a Baptist College attempted to apply for benefits under it. In speaking of the "primary effect" test, the Court observed:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."

Id. at 743.

In *Hunt*, the Court found no evidence that the college was pervasively religious and therefore held that the law, as applied in this case, did not have a primary effect of advancing religion.

Similar results were reached in *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976) and *Tilton v. Richardson*, 403 U.S. 672 (1970). In *Roemer*, a state statute authorized the payment of public funds to "any private institution of higher learning within the State of Maryland." The act specifically provided that the funds could not be used for sectarian purposes and an auditing procedure was established to ensure that this provision of the act was not violated. Moreover, funds were not available to institutions which awarded only "seminarian or

theological" degrees. In rejecting a claim that the primary effect of the law advanced religion, the Court noted that while the religiously operated colleges had some aspects of sectarian influence, they were not pervasively sectarian. The Court was not persuaded that the institutions in question were so permeated with religion that their sectarian aspects could not be separated from their secular functions.

Similarly, in *Tilton* the Court upheld the constitutionality of Title I of the Higher Education Facilities Act of 1963 (20 U.S.C. §§711-721). This Act provided federal grants for the construction of buildings and facilities used exclusively for secular educational purposes. The Act was challenged when several catholic colleges applied for construction grants. The Court rejected the "primary effect" argument "that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." 403 U.S. at 680.

On the other hand, there are several cases in which the Supreme Court has employed the "primary effect" rationale to strike down statutes providing aid to sectarian educational institutions. For example, in *Meek v. Pittenger*, 421 U.S. 349 (1975) the Court struck down a portion of a Pennsylvania statute which authorized private elementary and secondary schools, including religious ones, to receive instructional material and equipment. Although the instructional material and equipment was secular in nature, the Court invalidated the statute because its primary effect advanced religion in view of "the predominantly religious character of the schools benefitting from the Act." *Id.* at 364. The Court stated:

> "... faced with the substantial amounts of direct support authorized by [the] Act ..., it would simply ignore reality to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then characterize [the] Act ... as channelling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." *Id.* at 365-66 *quoting Hunt v. McNair*, 413 U.S. at 743.

Once again, a similar result was reached in *Wolman v. Walter*, 433 U.S. 229 (1977) in which the Court struck down a portion of a state statute which authorized payment to private religious elementary and secondary schools for field trip supervision. Using the "primary effect" rationale as well as the "entanglement" test, the Court concluded that it was simply impossible to separate the secular functions performed by the schools from their sectarian ones.[7]

In *Committee For Public Education v. Nyquist*, 413 U.S. 756 (1972) and *Levitt v. Committee For Public Education*, 413 U.S. 472 (1972) the Court invalidated two New York statutes on the ground that their primary effect

[7] It should also be noted that the *Wolman* Court invalidated a portion of the statute which authorized pupils, or their parents, in religious schools to receive secular instructional material and equipment. In *Meek*, the material and equipment was given directly to the schools. The Court did not consider this distinction to be relevant for First Amendment purposes.

advanced religion. In *Nyquist*, the statute authorized direct payments to private elementary and secondary schools, including religious ones, for "maintenance and repair" of school buildings. The statute also authorized tuition reimbursements and a tax break directly to parents who sent their children to non-public schools.[8] The Court concluded that the secular and sectarian purposes of the religious schools were so intertwined that there was no practical way to keep them separate. With respect to the "maintenance and repair" provisions of the statute, the Court stated:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions . . . Absent appropriate restrictions on expenditures . . . , it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." 413 U.S. at 774.

With respect to the tuition reimbursement section of the act, the Court concluded that it, too, had a primary effect that advanced religion. The Court first observed that a direct payment of money to the school would be invalid under the establishment clause. The Court was unimpressed with the argument that the statute was saved

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[8] In striking down the "tax benefits" portion of the New York statute, the Court distinguished its ruling in *Walz v. Tax Commissi* [illegible] 397 U.S. 664 (1969) which upheld the constitutionality of property tax exemptions to religious organizations for properties used solely for religious worship.

because the reimbursements were made to the parents not to the schools. "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. [T]he effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions."[9] *Id.* at 783. The decision in *Nyquist* was followed in *Sloan v. Lemon*, 413 U.S. 825 (1973) in which the Court struck down a Pennsylvania statute authorizing tuition reimbursements to parents who sent their children to non-public sectarian schools.

Finally, in *Levitt v. Committee For Public Education, supra*, the Court struck down a New York statute which authorized direct money grants to non-public elementary and secondary schools to perform "testing and recordkeeping" which was required by state law. Using the "primary effect" test, the Court ruled that the statute "constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." 413 U.S. at 480.

As is apparent from the foregoing, the focus of the "primary effect" test is upon the character of the religious institutions involved. Where the institution is dedicated to the inculcation of religious beliefs, state aid to that institution presents a serious risk of having a primary effect of advancing religion simply by virtue of the fact that it is

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[9] The Court rejected the contention that tuition reimbursements were, for First Amendment purposes, different from direct tuition payments.

practically impossible to isolate secular functions or purposes from the overriding role of the sectarian school to promote the tenets of such religious beliefs. This explains why state aid to sectarian colleges and universities has generally, been upheld while state aid to sectarian elementary and secondary schools is more likely to be viewed as violating the primary effect test. The United States Supreme Court has acknowledged that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Tilton v. Richardson*, 403 U.S. at 685; *Committee For Public Education v. Nyquist*, 413 U.S. at 777 n. 32; *Hunt v. McNair*, 413 U.S. at 734. There tends to be a considerable amount of academic freedom at church-related colleges and universities and the Court has taken notice of the fact that, generally, such institutions of higher learning do not have a pervasive religious atmosphere. Moreover, church-related colleges and universities usually do not have as their principal function the indoctrination of religious beliefs. Finally, the age of college students is a factor supporting the Supreme Court's view that public funds will not be used to influence one's religious beliefs. Accordingly, it is much easier in the college setting to separate the school's secular functions from its, religious mission.

The same cannot be said for church-related elementary and-secondary schools. Such schools exist for the very purpose of teaching and promoting the tenets of a particular religious faith. The process of education at religiously operated elementary and secondary schools is inextricably bound to the task of indoctrinating pupils in the principles of their faith. That task or mission permeates the entire educational curriculum and is directed at an age group

which is particularly susceptible to religious indoctrination. It is this pervasiveness of religious purpose which is at the heart of the "primary effect" test.

The "Entanglement" Test

The "entanglement" test appears to have first surfaced in the Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In applying the "entanglement" test, the Court, listed the following factors to be considered: (a) the character and purposes of the institution receiving state aid, i.e., college or elementary or secondary school; (b) the nature of the aid provided (e.g., one lump sum payment or annual grants); (c) the resulting relationship between the sectarian institution and the government. The statutes at issue in *Lemon I* involved a Rhode Island law which provided for a direct 15%, reimbursement to teachers in non-public elementary and secondary schools, and a Pennsylvania law giving a limited reimbursement to non-public elementary and secondary schools for teachers salaries, text-books and instructional materials. Obviously, the salary reimbursements went only to teachers in purely secular subjects.

The Court took notice of the distinct possibility that a teacher in a non-public school will have difficulty in preventing his religious beliefs from "seeping" into his course of instruction.

> "We . . . recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it

> hard to make a total separation between secular teaching and religious doctrine."

Id. at 618-619.

In order to assure that non-public school teachers, who have received salary reimbursements, are abiding by the First Amendment and are not preaching religious doctrines in the class-room, the state would have to engage in "[a] comprehensive, discriminating and continuing . . . surveillance." "Unlike a book, a teacher cannot be inspected once so as to determine the extent . . . of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.* at 619. The Court in *Lemon I* emphasized that the state must be "certain" that "subsidized teachers do not inculcate religion." *Id. See also Meek v. Pittenger*, 421 U.S. 349, 370-71. To be "certain" that *non-public* school teachers are not using the classroom to instill religious beliefs, there would have to be almost constant monitoring of church-related schools. It is this monitoring or surveillance by the government which entangles it, to an excessive degree, with the church.

The "entanglement" test is usually applied in situations where the so-called "human factor" is involved; e.g., classroom teachers and other professionals providing diagnostic tests and therapeutic services. *See Meek v. Pittenger, supra; Wolman v. Walter*, 433 U.S. 229 (1977). It is these types of activities which require the most surveillance. Moreover, these activities tend to be funded on a continuous basis, rather than on a lump sum basis, thereby adding to the government's entanglement, with church-sponsored schools.

The "Political Divisiveness" Test

In *Lemon I* the Court also referred to the "potential for political divisiveness" which statutory programs providing for aid to church – related schools are likely to generate. It is unclear whether the "political divisiveness" language in the Court's opinion was intended to be an independent test under the Establishment Clause or whether it is part of the "entanglement" test. In any event, it has been referred to by the Court in *Lemon I*, *Roemer* and *Nyquist*. The underlying premise of the "political divisiveness" factor is that state aid to church-related schools is likely to engender very strong political views about the propriety of using public money to aid church-related schools. This is particularly true with respect to elementary and secondary school education since it is an important issue of local concern. The Court emphasized that political divisiveness and debate along religious lines was one of the principal evils which the First Amendment was intended to eliminate. Finally, the Court noted that the potential for political differences along religious lines is more likely to occur where the state aid is of a continuing nature.

Analysis

Having set forth the criteria by which a statutory enactment will be measured in order to determine whether it offends the First Amendment's Establishment Clause, it is now possible to examine the practice of contracting with sectarian elementary and secondary schools in light of these criteria.[10]

[10] Implicit in this statement is the question of what is meant by the term "sectarian". As used in this opinion, the term "sectarian" refers to

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1. The "Purpose" Test

Initially, there would appear to be no difficulty in concluding that the practice of contracting with sectarian schools or educational services has a secular purpose. The underlying purpose of such a practice would appear to be the general education of all elementary and high school students. This purpose is certainly secular in nature and would not violate the "purpose" test under the First Amendment. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 773; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. The "Primary Effect" Test

The application of the "primary effect" test to the practice of contracting for educational services with religiously operated elementary and secondary schools, presents a much thornier question. In applying the "primary effect" test to the various forms of statutory aid which have been reviewed by the United States Supreme Court the critical factor which has emerged is the character of the institutions which receive public funds. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1974). Where an institution is characterized by a pervasively religious atmosphere, the receipt of public funds by that institution, either directly or indirectly, presents a significant risk that the primary

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those institutions which are characterized by a pervasively religious atmosphere and whose dominant purpose is the promotion of religious beliefs. This issue is discussed in greater detail in a later section of this opinion.

effect of such state aid will be to advance religion in contravention of the Establishment Clause of the First Amendment.

Assuming that a contract is made with a sectarian school for educational services, the effect of such a contract will be to expend public funds to send students to a religiously operated elementary or secondary school. While it is contemplated that such a contract would involve only secular educational services, it would seem highly unlikely that the school's secular functions could be separated from its predominantly religious purpose. It is difficult to imagine how the practice of contracting for educational services with religious schools differs from the tuition reimbursement program invalidated by the United States Supreme Court in *Committee for Public Education v. Nyquist, supra.* Indeed, the effect of such a contract is to make a direct payment of public money to a sectarian school for the purpose of providing educational services to elementary and high school students. In striking down a New York statute which attempted to provide tuition reimbursement to parents who sent their children to non-public sectarian schools, the United States Supreme Court stated:

> "There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . . "

Committee for Public Education v. Nyquist, 413 U.S. at 780.

In view of the foregoing, it is our conclusion that the practice of contracting with and paying the tuition of students at sectarian elementary and secondary schools

has a primary effect which advances religion and, therefore, violates the Establishment Clause of the First Amendment

3. The "Entanglement" Test

The practice fares no better under the "entanglement" test adopted by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In those instances where elementary and secondary students attend sectarian schools at public expense, the state would have to engage in a program of constant surveillance in order to be "certain" that non-public school teachers were not allowing religious instruction to "seep" into the secular educational curriculum. It is such excessive surveillance which entangles the state in the affairs of church-related schools such that the First Amendment is violated. Once again, the fact is that public funds would be expended to send children to a sectarian school and there would be no effective means of assuring that the wall of separation between church and state had not been breached. Accordingly it is our conclusion that the practice of contracting with sectarian schools for the purchase of educational services results in excessive entanglement between the state and such sectarian schools and therefore violates the First Amendments Establishment Clause.

4. The "Political Divisiveness" Test

Finally, the practice in question, when applied to sectarian elementary and secondary schools, could very well engender the type of political divisiveness along religious lines which the Supreme Court has indicated the First Amendment seeks to avoid. Members of a local

community tend to divide sharply on religious issues and it is easy to envision a situation in which members of a local community differ widely on whether public money should be expended to send students to religiously operated elementary and secondary schools. Such political divisiveness could be exacerbated by the fact that the duration of some contracts with sectarian schools could extend over a period of years.

Based upon the decisions of the United States Supreme Court, as examined above, it is our conclusion that the practice of paying the tuition of students attending sectarian elementary and secondary schools violates the Establishment Clause of the First Amendment to the United States Constitution.

State Court Decisions

As additional support for our conclusion, it should be observed that the Justices of the Maine Supreme Court have issued an opinion on proposed legislation which would have authorized the making of contracts with sectarian schools for secular educational services. In 1970 the 104th Legislature considered enacting L.D. 1751 (H.P. 1394) being "An Act Creating the Nonpublic Elementary Education Assistance Act". This proposed Act would have permitted administrative units "to contract and pay for secular education service." The use of this contractual authority was limited to situations where the local school committee had determined that the closing of a non-public school would have an adverse impact on the local tax rate or on classroom space in the public school system. In view of the possibility that the proposed Act implicated First Amendment concerns, the Legislature requested an

advisory opinion from the Justices of the Supreme Judicial Court. In *Opinion of the Justices*, Me., 261 A.2d 58 (1970), the Justices responded with four of them concluding that the proposed legislation violated the Establishment Clause and two of them reaching the opposite result.[11]

Mr. Chief Justice Williamson and Justices Marden and Weatherbee were of the opinion that the proposed Act ran afoul of both the "purpose" and the "primary effect" tests.

> "Budgets for the secular instruction may be technically separable from the budget of the entire operation of the [sectarian] schools, but the institution is an inseparable whole, which is strengthened in its institutional purpose when it is strengthened in any of its departments by outside financial assistance."

261 A.2d at 67.

Mr. Justice Webber reached a similar conclusion in a separate answer in which he stated that "my concern is that what in the legislative proposal is termed a contract for secular educational service will be viewed as in reality a method for providing public aid to a sectarian school in support of all of its purposes." 261 A.2d at 69.

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[11] It should be noted that the *Opinion* was issued while *Lemon v. Kurtzman* was pending before the United States Supreme Court. Consequently, the Justices did not have the benefit of a clear application of the "entanglement" test. All of the Justices appeared to have recognized the importance of the *Lemon* case. In fact, Mr. Chief Justice Williamson was of the opinion that *Lemon* would be totally dispositive of the issue.

Former Chief Justice Dufresne and Mr. Justice Pomeroy were of the view that the proposed Act did not offend the First Amendment. Both Justices relied heavily on the lower court's decision in *Lemon v. Kurtzman* which was later reversed by the United States Supreme Court. In view of the decision in *Lemon I*, and later Supreme Court cases, it is probable that the opinions of Justices Dufresne and Pomeroy would be different today.

While there are many differences between the proposed Act examined by the Supreme Judicial Court in *Opinion of the Justices, supra*, and the practice now under consideration, they both involved contracts with sectarian schools for secular educational services. Based upon the Justices *Opinion* and the Supreme Courts decisions in *Lemon v. Kurtzman* and *Committee for Public Education v. Nyquist*, there would appear to be a strong likelihood that the Law Court, if given the opportunity, would invalidate the practice of contracting for educational services with sectarian elementary and secondary schools.

Finally, courts in other Jurisdictions have uniformly held that statutes authorizing contracts with sectarian schools for secular educational services offend the Establishment Clause of the First Amendment. *See, e.g., John v. Sanders*, 319 F.Supp. 421, 430 (D.Conn.), *aff'd*, 403 U.S. 955 (1970); *Opinion of the Justices*, 357 Mass. 836, 258 N.E.2d 779 (1970); *In Re Proposal C*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Swart v. South Burlington Town School District*, Vt., 167 A.2d 514 (1961).

Conclusion

The following will summarize our conclusions regarding the constitutionality of the practice of using public

funds to contract with and pay for the tuition of students at sectarian elementary and secondary schools. We conclude: that the practice has a secular purpose and does not offend the First Amendment on that ground; that the practice has a primary effect which advances religion and violates the Establishment Clause of the First Amendment on that ground; that the practice produces excessive entangle-meet between the State and sectarian schools, and, consequently, violates the First Amendment on that ground. Finally, we note that the practice carries the potential for generating political divisiveness along religious lines and may violate the First Amendment on that basis also.

As discussed previously,[12] it is a fundamental canon of statutory construction that legislation is to be interpreted, if possible, so as to avoid rendering it unconstitutional. Where a statute is susceptible of two interpretations, the courts are bound to adopt that interpretation which sustains the statute's constitutionality in view of our conclusion that the practice of contracting with sectarian elementary and secondary schools for educational services offends the First Amendment, it is now necessary to determine whether sections 213-A, 912, 1289, 1291 or 1454 of Title 20 authorize school administrative units or districts to engage in such a practice. Each statute authorizes administrative units or districts or the Commissioner of Education, in limited situations, to pay the tuition for students at a private academy or at some other approved elementary or secondary school. None of the statutes explicitly include or exclude sectarian schools from their

[12] *See* pages 3-5 *supra.*

operation. To interpret the statutes as permitting school administrative units and districts to contract with sectarian schools for educational services would render them at least partially unconstitutional. On the other hand, an interpretation that the legislation does not authorize such a practice is a reasonable construction of the statutes and is consistent with the favored rule that statutory enactments should be construed, whenever possible, so as to uphold their constitutional validity.

In light of our conclusion that the practice of contracting with and paying the tuition for students at sectarian elementary and secondary schools is unconstitutional, we interpret 20 M.R.S.A. §§213-A,-912, 1289, 1291 and 1454 (1965-1979 Supp.) as not authorizing such a practice.[13] As so interpreted, it is our conclusion that sections 213-A, 912, 1289, 1291 and 1454 of Title 20 do not violate the First Amendment.

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[13] Even assuming that the statutes are interpreted as permitting school administrative units and districts to contract with sectarian schools, our conclusion that the practice is unconstitutional would remain unchanged. Moreover, any provision of the statutes deemed violative of the First Amendment would be severable from other statutory provisions. *See* 1 M.R.S.A. §71(8) (1979) which provides:

> "The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

Application of Opinion

During the course of this opinion, we have repeatedly referred to "sectarian" elementary and secondary schools and have concluded that the practice of using public funds to send students to such schools is unconstitutional. As used in this opinion and in the decisions of the United States Supreme Court, the term "sectarian" refers to those institutions which are characterized by a pervasively religious atmosphere and whose dominant purpose is the promotion of religious beliefs. The question of whether a particular school is pervasively religious in nature is a factual one and must be determined on an individual basis. *See, e.g., Weiss v. Bruno*, 82 Wash. 2d 199, 409 P.2d 973, 979-89 (1973). It is, of course, conceivable that, there may exist elementary and secondary schools which are religiously affiliated to a nominal degree only and are not necessarily characterized by a pervasively religious atmosphere. Within the context of this opinion, however, it is simply not possible to examine each religiously affiliated school to determine whether it is pervasively sectarian for First Amendment purposes.[14]

I hope this information is helpful to you. Please feel free to call upon me if I can be of further assistance.

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[14] The United States Supreme Court has had no difficulty in concluding that those institutions which might be described as typical "parochial or "religious" schools are pervasively sectarian. As noted above, however, there may be situations where a school is only nominally affiliated with a religious organization, and such nominal affiliation may be insufficient to characterize the school as a pervasively sectarian institution.

Sincerely

/s/ _____
RICHARD S. COHEN
Attorney General